

## 1963

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## Republic v Saidi Kabila Kiunga

[1963] 1 EA 1 (HCT)

**Division:** High Court of Tanganyika at Dar-Es-Salaam

**Date of judgment:** 31 December 1962

**Case Number:** 274/1962

**Before:** Spry J

**Sourced by:** LawAfrica

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*[1] Criminal law – Insanity – Burden of proof – Accused found guilty but insane – Reliance on accused's own evidence as to insanity – Misdirection – No power to order new trial – Criminal Procedure Code (Cap. 20), s. 210A, s. 228 and s. 329 (T.).*

### **Editor's Summary**

The accused was charged with unlawful wounding contrary to s. 228 of the Penal Code and was found guilty but insane so as not to be responsible for his actions. The prosecution alleged that before attacking the complainant the accused had said "You are going to die as my father is dead", and the evidence of the accused (*inter alia*) was that he did not know anything about the incident and that he was out of his senses. The magistrate in his judgment said that he had considered the circumstances of the case and especially the accused's own evidence and that he had no hesitation in believing the accused when he said that he remembered nothing of the incident. In revision

### **Held –**

- (i) the magistrate misdirected himself firstly in relying on accused's own evidence on the question of accused's insanity and secondly in failing to give consideration to the words the accused was alleged to have uttered immediately before striking the complainant.
- (ii) when a defence of insanity is raised the evidence of the accused must be considered judicially and given due weight but it must always be borne in mind that a person, however honest, can hardly take an impersonal view regarding his own mental stability and that a person who is claiming that he is exempt from criminal responsibility for his acts is anything but impartial; the graver the alleged offence, the greater the suspicion with which the accused's own assertions of his insanity should be regarded.
- (iii) the evidence regarding the accused's insanity did no more than raise a doubt as to the sanity of the accused at the time of the act, but it fell far short of establishing a margin of probability on the side of insanity.
- (iv) the decision of the magistrate constituted a special finding under s. 166 of the Criminal Procedure Code and did not amount to either a conviction or an acquittal within the meaning of s. 329 of the Criminal Procedure Code, with the result that the court was unable to order a new trial.

Magistrate's finding of insanity set aside. Accused convicted of unlawful wounding and case remitted to the district court to pass sentence in accordance with law.

**Cases referred to in judgment:**

- (1) *Nyinge s/o Suwatu v. R.*, [1959] E.A. 974 (C.A.).
- (2) *Bratty v. Attorney-General for N. Ireland*, [1961] 3 All E.R. 523.

**Judgment**

**Spry J:** The accused was charged with unlawful wounding contrary to s. 228 of the Penal Code. He was found guilty of the act charged but insane so as not to be responsible for his actions.

There was in fact no sufficient evidence to justify the special finding. Six witnesses were called. Of these, two gave evidence of arrest and one evidence regarding the injuries sustained by the complainant. Two gave evidence which was irrelevant to the proceedings. The only evidence of the alleged offence was that of the complainant. He testified that he shared a room with the accused, who was his nephew. During the night in question, the accused "complained that his head was not all right". Shortly afterwards, the accused attacked the complainant with a panga and a knife, saying "You are going to die as my father is dead". (It appears that the accused's father died this year.) The witness added

"I cannot say whether the accused was out of his mind or not. He was using great strength".

The accused elected to give evidence. He said –

"I am told that I stabbed my father with a knife but I don't know anything about it. I was out of my senses. My mind is all right now. I was amazed to find myself in prison. I do not remember being arrested. I was having trouble with my head before this event. Sometimes my whole mind would go blank. People would tell me I insulted them."

The magistrate also took note of a medical report which had been produced in Miscellaneous Civil Cause No. 10 of 1962 in the district court of Rufiji. This showed that the accused had been under observation for a period of five weeks and that his mental condition had been found to be normal. The admission of this report was irregular; the doctor should have been called to give evidence.

The trial magistrate applied his mind most carefully to the question of insanity, but, with respect, I think he misdirected himself. In the first place, he does not appear to have considered the burden of proof. When insanity is advanced by the defence, as it was in this case, the burden of proof is on the defence, although it is not a heavy burden. As Windham, J.A. (as he then was) said in *Nyinge s/o Suwatu v. R.* (1), [1959] E.A. 974 (C.A.):

"he must show, on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely. Merely to raise a reasonable doubt might still leave the balance tilted on the side of sanity."

The magistrate properly directed himself that lack of motive is not a sufficient ground for finding the accused insane but he went on –

"I have to consider all the circumstances of the case and especially accused's own evidence. I have no hesitation in believing him when he says he remembers nothing of these events."

These remarks may be criticised in two respects. First, the use of the word “especially” suggests that the magistrate regarded the accused as a particularly reliable witness on the question of his own sanity. The reverse is the case. The accused’s evidence must of course be considered judicially and given due weight but it must always be borne in mind that a person, however honest, can hardly take an impersonal view regarding his own mental stability and that a person who is claiming that he is exempt from criminal responsibility for his acts is anything but impartial. The graver the alleged offence, the greater the suspicion with which the accused’s own assertion of his insanity must be regarded.

Secondly, the fact that the accused may now remember nothing of the events in question does not necessarily mean that he did not at the time know what he was doing. Lord Denning said, in *Bratty v. Attorney-General for N. Ireland* (2), [1961] 3 All E.R. 523, at p. 532:

“Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time.”

In this connection, the trial magistrate gave no consideration to the words the accused is alleged to have uttered immediately before striking the complainant. They are words which might have sprung from an insane delusion but they might equally have sprung from a suspicion, however unfounded it might be, that the complainant was in some way responsible for the comparatively recent death of the accused’s father. If the latter were the case, the words would indicate that the accused knew very well what he was doing. It was particularly unfortunate that no evidence was called which might have indicated the true interpretation.

In the circumstances, I should have preferred to order a new trial but after hearing Mr. Wickham, for the Republic, I am satisfied that I have no power to do so. A special finding is, in my opinion, for the purposes of s. 329 of the Criminal Procedure Code, neither a conviction nor an acquittal. I cannot, therefore, avail myself of the wide powers conferred by para. (a) of sub-s (1) of that section and can only, under para. (b), alter or reverse the order of the trial magistrate.

The special finding consists of two parts: first, there is the finding that the accused was guilty of the act as charged and, secondly, there is the finding that he was insane at the time. So far as the first is concerned, there was evidence which the magistrate was entitled to accept and did accept and did accept and I can see nothing on the record to suggest that he was wrong. So far as the second is concerned, the evidence does no more than raise a doubt as to the sanity of the accused at the time of the act. It falls far short, in my opinion, of establishing a margin of probability on the side of insanity.

I must, therefore, and do, set aside the finding of insanity and, on the basis of the magistrate’s finding as a fact that the accused was guilty of the act charged, convict the accused of the offence charged.

I have not the material before me to enable me to inform myself as to the sentence proper to be passed and I therefore remit the proceedings to the district court with a direction to take such evidence as may be necessary in accordance with s. 210A of the Criminal Procedure Code and thereafter to pass sentence in accordance with law.

*Magistrate’s finding of insanity set aside. Accused convicted of unlawful wounding and case remitted to the district court to pass sentence in accordance with law.*

For the Republic:

WR Wickham (Assistant to the Law Officers (Tanganyika)

The Attorney-General Tanganyika

The accused in person.

**Mulla Ali Bin Ismail v R**  
**[1963] 1 EA 4 (SCK)**

**Division:** HM Supreme Court of Kenya at Nairobi  
**Date of judgment:** 26 October 1962  
**Case Number:** 851/1962  
**Before:** Rudd Ag CJ and Edmonds J  
**Sourced by:** LawAfrica

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*[1] Building control – Municipalities – Building restrictions – Unauthorised use of building – Allowing building to be used otherwise than for purpose for which constructed – Ground floor of building erected as shops and stores and let as such – Stores used as dwelling – houses by tenants – Tenants notified by building owner to cease using stores as living quarters – Tenants continue using stores as dwelling-houses – Building owner charged for allowing unauthorised user – Misdirection – Nairobi Municipality (Building) By-laws, 1948, By-law 352 (a) (K.).*

**Editor's Summary**

The appellant owned a building, the ground floor of which consisted of two shops and two stores let to two tenants. At the time of the erection of the building the approved plan showed that the two stores were erected as stores and although they were let to the tenants as stores, it was found that the tenants were using the stores as dwelling-houses. When the matter was brought to the notice of the appellant he notified the tenants to cease using the stores as living quarters but they continued doing so. The appellant was then charged in the magistrate's court and convicted under by-law 352 (a) of the Nairobi Municipality (Building) By-laws, 1948, for allowing the building to be used otherwise than for the purpose for which it was constructed, the magistrate holding that the failure of the appellant, when letting the premises, to insist on a covenant by the tenants not to use the premises otherwise than as shops and stores, constituted allowing an unauthorised user. On appeal

**Held –**

- (i) although in prosecutions for offences under By-law 352 (a) of the Nairobi Municipality (Building) By-laws, 1948, it may not be enough in certain circumstances for the building owner to show that he has sublet the premises and accordingly has no control over their user by the tenant, each case must be considered in the light of the surrounding circumstances as proved in evidence and such an owner is not put in the position of an insurer against unauthorised user of the premises by the tenant.
- (ii) the stores were specifically let as stores and not as dwellings and in the circumstances of the case the appellant could not be said to have allowed the unauthorised user of the building.
- (iii) failure on the part of a building owner to incorporate in the agreement for the letting of his



premises specific covenants restricting their user by the tenant to the purposes authorised by the local authority does not constitute on the part of the building owner the allowing of an unauthorised user by the tenant.

Appeal allowed. Conviction quashed and sentence set aside.

### **Cases referred to in judgment:**

### **Judgment**

**Rudd Ag CJ:** read the following judgment of the court:

The appellant appeals from conviction under By-law 352 (*a*) of the Nairobi Municipality (Building) By-laws, 1948, in that being the owner of a building in the city of Nairobi he did on July 2, 1962, allow the building to be used otherwise

than for the purpose for which it was constructed. The ground floor of the building in question consists substantially of two shops at the front and two stores at the back. The appellant was the owner of the premises and let one shop and store to a tenant and the other shop and store to another tenant. The lettings were verbal but it is clear from receipt that each shop and store was let as a shop and store and not as a dwelling or for general purposes. When the buildings were erected the approved plan showed that the two stores were erected as stores and not as dwellings or parts of dwellings. No change of user had ever been approved under the by-laws. It was proved that on inspection by a building inspector on May 21 both these stores were being used for living purposes. They contained domestic furniture and utensils and people were living in them. On June 12 the appellant wrote to each of the tenants stating that the premises were let to him as a shop and store and not as living quarters and that it appeared that the tenant was probably using the store as living quarters contrary to the agreement. The letter requested the tenant to cease such use as living quarters immediately otherwise the appellant would hand over the matter to his lawyer for further action.

A building inspector again inspected the premises on July 31 and found that one of the stores was still being used for living purposes as it was on May 21. The other store was locked, no one appears to have been found in it but it still contained domestic furniture and utensils.

We think that there is some doubt as to whether it was satisfactorily proved that this second or locked store was actually being used for living purposes on July 31 or on July 2 which is the date laid in the charge. However, we do not find it necessary to decide the appeal on this point which applies to only one of the two stores which are the subject of the charge.

The substantial question in the appeal was whether or not the appellant was guilty on July 2 of allowing these stores to be used for living purposes, whereas they were authorised to be used as stores and not as living quarters.

We agree that in prosecutions for such offences in certain circumstances it may not be enough for the building owner to show that he has sublet the premises and to claim that after the subletting he had no control over the user of the premises by the tenant. In certain circumstances the fact that the owner has sublet the premises will not prevent him from being held to have allowed an unauthorised user of the premises by the tenant. However, the matter in each case has to be considered according to the particular circumstances which have been proved in the particular instance. An owner who has sublet is not put in the position of an insurer against unauthorised user by his tenant. In the present case each shop and store was specifically let as a shop and store and not as a dwelling. When the matter was brought to the notice of the appellant he wrote, without undue delay, to the tenants before the date laid in the charge requiring them to cease their unauthorised user of the premises and threatening legal action on advice if they failed to comply with his demand. This letter was sent on June 12 and if the tenants proved obdurate we do not consider that the appellant could be expected to secure their eviction or compliance with his request as soon as July 2. We think that it is not immaterial that the part of the premises which were subject to unauthorised user were hidden at the back of the shop and it would possibly be difficult for the appellant to discover the particular user of that part of the premises. We note that under the by-law the occupier or the person who actually makes the unauthorised user is himself amenable to the provisions of the by-law and proceedings could be taken against him. We have not been informed as to whether or not any such proceedings have been taken against the tenants of the two stores. Whether they have or not we think that in this particular case the appellant has not allowed the unauthorised user. We do not agree with the magistrate's view that failure to

incorporate in the agreement for the lease of the premises specific covenants restricting user constitute allowing an unauthorised user. We think that the magistrate misdirected himself on this point and that that misdirection was material and would in itself require that the appeal be allowed.

We allow the appeal, set aside the conviction and sentence and acquit the appellant.

*Appeal allowed. Conviction quashed and sentence set aside.*

For the appellant:

*FE Abdullah*

*FE Abdullah, Nairobi*

For the respondent:

*F Mallon (Crown Counsel, Kenya)*

*The Attorney-General, Kenya*

**Saidi s/o Mwakawanga v Republic**  
**[1963] 1 EA 6 (HCT)**

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| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 14 December 1962                          |
| <b>Case Number:</b>      | 786/1962                                  |
| <b>Before:</b>           | Weston J                                  |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Criminal law – Burden of proof – Alibi – Misdirection – Penal Code, s. 265 and s. 284 (T.).*

**Editor's Summary**

The appellant was convicted of conversion of a motor-cycle not amounting to theft contrary to s. 284 of the Penal Code. According to the prosecution evidence the police found the appellant pushing the motor-cycle and trying to start it at night and when asked how he had obtained the motor-cycle the appellant dropped the motor-cycle and ran off. The appellant had put forward the defence of an alibi and a defence witness whom the magistrate described as “honest and respectable” gave evidence to the effect that the appellant was at the material time innocently sleeping miles away from the spot where the police had seen him. The magistrate reached the conclusion that the policeman was not mistaken in his identification of the appellant and that the appellant was the person in possession of the motor-cycle on the night it was stolen, if stolen it was. On appeal,

**Held –**

- (i) an accused person putting forward an alibi as an answer to a charge made against him does not in law thereby assume any burden of proving that answer and if the accused by adducing evidence of an alibi introduces into the mind of the court a doubt that is not unreasonable, then the court must acquit him.

*R. v. Johnson*, [1961] 3 All E.R. 969, applied.

- (ii) the magistrate had put the prosecution and the appellant to prove their respective assertions on a basis of equality and it would be unsafe to allow the conviction to stand.

Appeal allowed. Conviction quashed and sentence set aside.

**Cases referred to in judgment:**

- (1) *Shah (Zaverchand Dhanji) v. R.* (1956), 23 E.A.C.A. 410.
- (2) *R. v. Johnson*, [1961] 3 All E.R. 969.

## Judgment

**Weston J:** The appellant was charged in the district court of Iringa District at Iringa with stealing a motor-cycle contrary to s. 265 of the Penal Code, and was convicted of conversion of the machine not amounting to theft contrary to s. 284 of the Penal Code and sentenced to six months' imprisonment. This is an appeal against both conviction and sentence.

The facts of the case for the prosecution are as simple as can be. The complainant left his machine on the verandah of his house when he went to bed at about half past midnight. On awakening next day he found it was gone. In the early hours of that morning, a police constable driving a police vehicle along a road not far from the complainant's house saw a man pushing a motorcycle and trying to start it. This witness, in chief, continued:

"I stopped close to him and the lights of my vehicle were on him. I got out to see if I could help. I said 'How did you get a motor-cycle when you are a turn boy'. I said this because I recognised him after I got out of the vehicle. I did again offer to help. Then he realised I think that I was a policeman and he dropped the motor-cycle and ran off."

In cross-examination he amplified his evidence:

"I am not lying. The big spot light of the Morris was on you as well as the other lights and I saw you clearly."

The machine was the missing motor-cycle, and the learned magistrate was quite satisfied "that the policeman was not mistaken and that the accused" – i.e. the appellant – "was the person in possession of the motor-cycle on the night it was stolen, if stolen it was". The appellant was arrested a day or so later.

The learned magistrate nevertheless found this "a most difficult case to decide". This was because the appellant put forward an alibi in reply to the case against him, and a witness whom the court described as "honest and respectable" gave evidence for the defence that the appellant was at the material time innocently sleeping many miles away from the spot where the police constable had testified he had seen him. The learned magistrate comments further that this witness's demeanour was good and that he, the magistrate, was sure the witness *thought* he was telling the court the truth.

The problem is whether in these circumstances it would be proper for this court to interfere with the conclusion reached by the learned magistrate. Certainly, he was fully entitled to accept the evidence of a witness whom he considered to be both honest and accurate and to reject that of a witness who, in his opinion, though honest was mistaken; and, as has often been said, this court on appeal does not easily or lightly question the view taken by the court of trial of the credibility of witnesses whom that court has had the advantage of seeing and hearing and this court has not. It does not do so, in this case. But I do not think the issue here turns on any question of credibility. It turns, as I see it, on whether or not the learned magistrate correctly directed himself on the burden of proof in the case before him.

As to this the judgment, which is very short, is silent. Indeed, I have already quoted the most important words from the relevant portion of it, but it may perhaps be as well if I read that portion at this point in its entirety:

"This is a most difficult case to decide. It is rare in these courts that an apparently honest and respectable witness stands up in the witness box and delivers himself of an apparently unshakeable alibi for an accused person. Here that has happened. The witness's demeanour was good and I am sure he thinks he is telling me the truth. However the constable who identifies accused knows him well; there can be no question about the

necessary

illumination for identification purposes. I am quite satisfied he is not mistaken and that accused was the person in possession of the motor-cycle on the night it was stolen – if stolen it was.”

It is well settled – see *Shah (Zaverchand Dhanji) v. R.* (1) (1956), 23 E.A.C.A. 410 – that while it is not essential that a judge or magistrate in his judgment should expressly refer to the law governing onus of proof, if he does not do so an appellate court may look through the judgment for some indication that he had the proper rule in mind. I confess I cannot read into the judgment in this case any indication that the learned magistrate’s finding was based on a correct appreciation of what he himself recognised to be the peculiar difficulty raised by the nature of the evidence which he had before him. Indeed, looking at what little the learned magistrate did say – and I give full weight to the argument of learned Crown counsel (as he then was) that an appellate court will not readily assume that an experienced judge or magistrate has failed to address his mind to such a fundamental element in a criminal trial as the burden of proof, for which proposition the case I have cited is good authority – reading the judgment, I say, I find it difficult to resist the feeling that the court here put the prosecution and the appellant to proof of their respective assertions on a basis of equality, and that starting on this equal footing the prosecution evidence commended itself to the court more than that for the defence.

In my view it suffices for the decision of this appeal that examining the judgment carefully I cannot fairly say the learned magistrate did not approach the solution of the problem before him in this manner. It cannot too often be repeated that except in special circumstances which do not concern us here the accused in a criminal trial is never to be put to the proof of any allegation he makes in his defence on pain of conviction if he fails – in other words, and shortly, the accused in any criminal trial does not have to prove his innocence. With particular reference to the defence advanced in this case, there is no doubt since the decision of the Court of Criminal Appeal in *R. v. Johnson* (2), [1961] 3 All E.R. 969, that an accused person putting forward an alibi as an answer to a charge made against him does not in law thereby assume any burden of proving that answer. It suffices to secure acquittal that the accused by such evidence as he may choose to adduce introduces into the mind of the court a doubt that is not unreasonable. Evidence that it was physically impossible for him to have committed the offence alleged against him because he was elsewhere at the time it was committed is no different in this respect from any other exculpatory testimony submitted by or on behalf of the accused.

For these reasons I think it would be unsafe to allow this conviction to stand, and this appeal accordingly succeeds. The appellant’s conviction is quashed and the sentence imposed in respect of it is set aside. He is to be released forthwith unless he is liable to detention in some other connection.

*Appeal allowed. Conviction quashed and sentence set aside.*

The appellant did not appear and was not represented.

For the respondent:

*AE Taylor* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

**Lenton s/o Mkirila v Republic**  
[1963] 1 EA 9 (HCT)

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 21 December 1962  
**Case Number:** 802/1962  
**Before:** Sir Ralph Windham CJ  
**Sourced by:** LawAfrica

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*[1] Criminal law – Evidence – Child – Unsworn evidence – Corroboration – Nature of corroboration required – Whether corroboration required must be corroboration implicating accused – Criminal Procedure Code (Cap. 20), s. 152 (3) (T.) – Children and Young Persons Act, 1933, s. 38 (1) – Oaths and Statutory Declarations Ordinance (Cap. 15), s. 19 (1) (K.).*

### **Editor's Summary**

The appellant was convicted of burglary and theft and the identification of the appellant as the burglar and thief rested solely on the unsworn evidence of two children of tender years of the complainant. The evidence of these two children was that, while in the house at night, they saw that the house door had been removed from its hinges, and saw the appellant, whom they had known for years, sitting in the house. The magistrate appreciated the necessity for the corroboration of the unsworn evidence of the children, and considered that there was such corroboration in the evidence of the complainant and his wife to the effect that they had left the children in the house on the night in question and that on their return they found the door off its hinges, their box broken open, and cash and a weighing machine missing. On appeal the point for decision was whether the corroboration of the evidence of a child of tender years required by the proviso to s. 152 (3) of the Criminal Procedure Code must be corroboration implicating the accused, although the proviso itself does not expressly so require.

### **Held –**

- (i) the corroboration of the unsworn evidence of a child of tender years required by the proviso to s. 152 (3) of the Criminal Procedure Code must be corroboration implicating the accused, although the section does not expressly say so.
- (ii) there was no such corroboration of the unsworn evidence of the complainant's two small children implicating the appellant as the burglar and accordingly the conviction must be quashed.

Appeal allowed. Conviction quashed.

### **Cases referred to in judgment:**

- (1) *Kibangeny v. R.*, [1959] E.A. 92 (C.A.).
- (2) *R. v. Baskerville*, [1916] 2 K.B. 658; [1916–17] All E.R. Rep. 38.

### **Judgment**

**Sir Ralph Windham CJ:** The appellant was convicted on two counts: first, burglary; second, theft from the burgled house. He was sentenced to terms of imprisonment of twelve and nine months, to run



concurrently. On December 14 I allowed his appeal forthwith. I now give my reasons for having done so.

That there was a burglary and theft as alleged was never challenged. But the identification of the appellant as the burglar and thief rested solely on the unsworn evidence of two children of tender years, daughter of the complainant, both of whom said that, while in the house at night, they saw that the house

door had been removed from its hinges, and saw the appellant, whom they had known for years, sitting in the house by the fire, that on their asking him why he was there he said he had come for a talk but refused to go away, that they then fell asleep and, on waking next morning, found that he had gone and that a box which had been in the house was lying outside having been broken into.

The learned trial magistrate appreciated the necessity for the corroboration of the unsworn evidence of these two children, who could not of course corroborate each other, and he considered that he had found it in the evidence of the complainant and his wife to the effect that they had indeed left the children in the house on the night in question (being away from it themselves) and that on their return they found the door off its hinges, their box broken open, and cash and a weighing machine missing.

This evidence certainly corroborated that of the children in the sense that it supported the truth of their story that somebody had burgled the house that night. But it in no way corroborated it on any point implicating the appellant. Now the statutory provision in the laws of Tanganyika which requires the corroboration of the unsworn evidence of children of tender years, in criminal cases, is the proviso to s. 152 (3) of the Criminal Procedure Code, as amended in 1960. Section 152 (3) reads as follows:

“152. (3) Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth:

Provided that where evidence received by virtue of this sub-section is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof.”

The point for decision is whether the corroboration required by the proviso must be corroboration implicating the accused; for the proviso does not expressly so require. And in this connection it is interesting to note that the corresponding provisos in the legislations both of England and of Kenya, namely to s. 38 (1) of the Children and Young Persons Act, 1933, and to s. 19 (1) of the Oaths and Statutory Declarations Ordinance of Kenya, respectively, are worded identically with the proviso in the Tanganyika s. 152 (3) except that, at the end of each of them, there appear the words “implicating him”, so that the necessary corroboration of the child’s unsworn evidence against the accused is expressly required to be “some other material evidence in support thereof implicating him”.

Why these last two words were omitted from the Tanganyika proviso (the most recently enacted of the three) I do not know. In *Kibangeny v. R.* (1), [1959] E.A. 92 (C.A.), the Court of Appeal for Eastern Africa were considering the requirements of the proviso to s. 19 (1) of the Kenya Ordinance when they held, at p. 95, that the child’s unsworn evidence must be corroborated by “other material evidence implicating the appellant”. Nevertheless, I consider that, according to the ordinary canons of construction, the meaning of the words “corroborated by some other material evidence in support thereof” in the proviso to s. 152 (3) of the Criminal Procedure Code of Tanganyika must be ascertained upon the merits of the words themselves, and that their interpretation is not to be coloured by the fact that the words “implicating him” do not appear at the end of the proviso, as they do appear in the corresponding provisos in the legislation of England and of Kenya.

Applying this line of interpretation, I am quite satisfied that there must be read into the proviso to s. 152 (3) a requirement that the necessary corroboration must be corroboration implicating the accused. In every criminal charge, it is the guilt of the accused which is in issue. Normally it is undisputed that the crime was committed by somebody; and even where that question too is in issue, the crucial question is whether it was the accused who committed it. Corroboration in criminal cases, whether it be of accomplices, or of complainants in sexual offences, or (as here) of the evidence of small children, is either made legally necessary or at least held to be highly desirable because it would be dangerous for an accused to be implicated, and thereby convicted, solely by an accomplice, whose evidence against him might be tainted through vindictiveness or hopes of personal gain, or by a complainant in a sexual case, whose evidence might likewise be coloured by vindictiveness and is in any case usually difficult to refute, or by a child of tender years, whose evidence is, through that very fact, likely to be unreliable because its mind has not yet learnt to understand fully the boundaries between fact and imagination and is also more open to the outside suggestions or promptings of adults. In all these cases it is the implicating of the accused person by the potentially unreliable witness which needs to be corroborated; it is no comfort or safeguard to an accused if such witness is corroborated merely in so far as he has testified that the crime in question was committed by somebody or other.

It was with such considerations in mind, no doubt, that in laying down the nature of the corroboration of accomplices' evidence, which had been required at common law by long practice virtually amounting to a rule of law, there being no statutory requirement that such corroboration should "implicate the accused", the Court of Criminal Appeal, in *R. v. Baskerville* (2), [1916] 2 K.B. 658, said at p. 667:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, 'implicates the accused', compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

I accordingly hold that the corroboration required by the proviso to s. 152 (3) of the Criminal Procedure Code, must be corroboration implicating the accused, although the section does not say so. In the present case there was no such corroboration of the unsworn evidence of the complainant's two small children implicating the present appellant as the burglar. It was on these grounds that I allowed his appeal and quashed his conviction.

*Appeal allowed. Conviction quashed.*

The appellant did not appear and was not represented.

For the respondent:

*KRK Tampi* (State Attorney, Tanganyika)

*The Attorney-General Tanganyika*

**Republic v Amratlal Pragji Valambia**  
**[1963] 1 EA 12 (HCT)**

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 31 January 1963  
**Case Number:** 654/1962  
**Before:** Biron J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Intimidation – Trade union – Employee told by employer he would be dismissed if he became member of a particular union – Whether threat of personal violence necessary to constitute intimidation – Trade Unions Ordinance (Cap. 381), s. 48 and s. 50 (1) (a) (T.) – Conspiracy and Protection of Property Act, 1875, s. 7 – Trade and Trade Unions Act, 1927, s. 3 (2) – Employment Ordinance (Cap. 366), s. 14 (a) (T.).*

**Editor’s Summary**

The respondent was charged with intimidation contrary to s. 50 (1) (a) of the Trade Unions Ordinance, the particulars of the charge being that he had wrongfully and without legal authority intimidated one of his employees by telling him that if he became a member of the Transport and General Workers Union he would be dismissed from his employment. The respondent was acquitted on a submission of no case to answer, the magistrate ruling that as there was no evidence that the respondent had threatened the employee with personal violence there was no intimidation. On appeal by the appellant by way of case stated,

**Held** – in view of the definitions of the words “to intimidate” and “injury” in s. 48 of the Trade Unions Ordinance to constitute intimidation, it was not necessary to show that the employee had been threatened with personal violence.

Appeal allowed. Order acquitting the respondent set aside. Case remitted to the district court to determine the case according to law.

**Cases referred to in judgment:**

- (1) *R. v. McKeevit*, (1890), cited in [1891] 2 Q.B. 545.
- (2) *Curran v. Treleaven*, [1891] 2 Q.B. 545.
- (3) *Gibson v. Lawson*, [1891] 2 Q.B. 545.
- (4) *Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255.

**Judgment**

**Biron J:** This is an appeal by way of case stated brought by the Director of Public Prosecutions, from an acquittal by the Morogoro district court consequent on a ruling by the learned magistrate upholding a submission by the defence that there was no case for the accused to answer.

The accused was charged with intimidation contrary to s. 50 (1) (a) of the Trade Unions Ordinance (Cap. 381). The particulars of the charge as set out in charge sheet are that –

“Amratlal Pragji Valambia on or about June 21, 1962, within the district and township of Morogoro, in the Eastern Region, wrongfully and without legal authority intimidated one Nizar Gulamhussein Premji, his employee by telling him that if he became a member of the Transport and General Workers Union he would be sacked, which union the said Nizar Gulamhussein Premji had a legal right to join.”

At the close of the case for the prosecution, learned counsel for the accused submitted that there was no case to answer. This submission was upheld by the learned magistrate in a ruling, which reads:

“The only question I need consider here is whether I should adopt the decision in *R. v. McKeevit*, cited by learned defence counsel, and referred to at para. 3729 of Archbold (34th Edn.). The note on this case reads ‘It was ruled that to constitute intimidation within the meaning of this section personal violence must be threatened’. This same paragraph also refers to an opinion expressed obiter in *Curran v. Treleven* that there was much to be said for this view. The section referred to is s. 7 of the Conspiracy and Protection of Property Act, 1875, from which s. 50 (1) (a) of the Trade Unions Ordinance, under which the accused is charged, has been taken verbatim. I see no reason to doubt why this decision is still not good law, particularly as there is so little decided authority from the courts of this country. As there was no evidence that the accused threatened the complainant with personal violence, and following the decision of *R. v. McKeevit*, I dismiss the charge and acquit the accused.”

It is from this ruling that this appeal by way of case stated has been brought.

In his case stated the learned magistrate has set out under the heading “*Facts found proved or admitted*” that –

“Nizar Gulamhussein Premji was employed as a mechanic by the accused, the proprietor of Babu Garage. On June 22, 1962, the regional secretary of the Transport and General Workers Union paid a visit to these premises, his purpose in going there being to collect funds and enrol new members. Both the accused and the said Nizar Gulamhussein Premji were present during the union official’s visit. Later that day Nizar Gulamhussein Premji called upon the regional secretary at the union’s office and told him what he alleged the accused had spoken to him; as a result the regional secretary reported the matter to the police. At the close of the case for the prosecution, defence counsel made a submission that there was no case for the accused to answer, and the court accordingly ruled on this submission.”

The case stated then continues as follows:

“*Finding of Court:*

“Following the decision of *R. v. McKeevit*, whereby it was for the prosecution to establish that the accused threatened personal violence, and as no such evidence was given, the charge was dismissed and the accused acquitted.

“*Any question of law for consideration of the High Court:*

“Whether the subordinate court was correct in adopting this decision having regard to the fact that the accused was charged under s. 50 (1) (a) of the Trade Unions Ordinance and the definitions set out in s. 48.

“*Any question of law which the Attorney-General requires submitting for the opinion of the High Court:*

“Whether ‘Intimidation’ within the meaning of s. 50 (1) (a) of the Trade Unions Ordinance, read with s. 48, means threat of personal violence only.”

In arguing this appeal, Mr. Vellani, who appeared for the respondent accused, attempted to extend the issues and introduce new grounds for upholding the acquittal; that the charge was defective, that the union concerned was not a trade union, and that the accused’s act was not “wrongful and without legal authority” within the meaning of the Ordinance. I upheld the objections of Mr. Troup, who appeared for the Director of Public Prosecutions, that it was

beyond the scope of this instant appeal to deal with these points raised, and learned counsel for the accused was dissuaded from pursuing the first two, but he persisted in his submission on the last, with which point I propose to deal after disposing of what I consider to be, as I intimated to learned counsel, the real and only point for the decision of the court in these proceedings; that is, as expressly submitted, “whether ‘intimidation’ within the meaning of s. 50 (1) (a) of the Trade Unions Ordinance, read with s. 48, means threat of personal violence only”.

As the learned magistrate rightly directed himself, the section under which the accused was charged is taken verbatim from s. 7 of the English Conspiracy and Protection of Property Act, 1875. Although we are concerned only with para. (a) of sub-s. (1) of the Ordinance, it is material to have set out the whole of s. 50 under which the accused was charged:

- “(1) Every person who, with a view to compelling any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority:
- (a) uses violence to or intimidates such other person or his wife or children or injures his property; or
  - (b) persistently follows such other person about from place to place; or
  - (c) hides any tools, clothes or other property owned or used by such other person or deprives him of or hinders him in the use thereof; or
  - (d) watches or besets the house or other place where such person resides or works or carries on business or happens to be or the approach to such house or place; or
  - (e) follows such other person in a disorderly manner in or through any street or road;
- shall be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding three months.
- “(2) Attending at or near any house or place in such numbers or in such manner as is by para. (b) of s. 49 of this Ordinance declared to be unlawful shall be deemed to be a watching and besetting of that house or place within the meaning of this section.”

The case of *R. v. McKeever* (1) relied on by the learned magistrate, as noted, is not to be found in any report but is cited with approval in *Curran v. Treleaven* (2), [1891] 2 Q.B. 545 at p. 562. In that case – or rather in *Gibson v. Lawson* (3), [1891] 2 Q.B. 545, which was heard together – Lord Coleridge, C.J., stated in his judgment (at p. 559):

“ ‘Intimidate’ is not, as has been often said by judges of authority, a term of art – it is a word of common speech and everyday use; and it must receive therefore, a reasonable and sensible interpretation according to the circumstances of the cases as they arise from time to time. We do not propose to attempt an exhaustive definition of the word, nor a complete enumeration of the cases to which it may be properly, nor of those to which it may be improperly, applied.”

Like the learned justices of appeal, I do not propose to attempt any definition of the word “intimidate”, nor do I consider it necessary, but not for the same reason; my reason being that I am spared, even precluded from attempting any definition, as the very Ordinance under which the accused was charged itself lays down what “intimidate” in the Ordinance means. Section 48 expressly defines “to intimidate” and also “injury” as follows:

“ ‘To intimidate’ means to cause in the mind of a person reasonable apprehension of injury to him or to any member of his family or to any of his dependants or of violence or damage to any person or property;

“ ‘injury’ includes injury to a person in respect of his business, occupation, employment, or other source of income, and includes any actionable wrong.”

The workman in the case before the court alleged, and I quote from his evidence:

“Union officials left garage later . . . After they had gone I was told by accused that if I joined union I would leave the job.”

And again:

“At 2 p.m. when I came back to work, accused said to me ‘If you get a union card you will get the sack’.”

The effect of this threat which the workman said, not surprisingly, he understood to mean that if he joined the union he would lose his job, was, and I quote:

“I felt very distressed when accused spoke these words; he refused me to become member of union”.

I fail to see how it can be disputed that such a threat constitutes intimidation within the meaning of s. 50 (1) (a) as expressly defined by s. 48 of the Ordinance. In fact, had s. 48, which incidentally, is taken from s. 3 (2) of the English Trade Disputes and Trade Unions Act, 1927 (enacted after the general strike and repealed in 1946), been brought to the attention of the learned magistrate, it is inconceivable that he would have ruled on the particular point of law raised as he did.

Learned counsel for the accused persisted in pursuing his submission that the accused’s act was not “wrongful and without legal authority” within the meaning of the Ordinance. Although, as I intimated to him, any ruling of mine on this point may well be obiter, as the persisted in his submission, I propose to accede and deal with it.

The expression “wrongfully and without legal authority” as it appeared in the 1875 Act, was considered and ruled on by the court of appeal (in England) in *J. Lyons & Sons v. Wilkins* (4), [1899] 1 Ch. 255. Although that case was concerned with watching and besetting under sub-head (4) of s. 7 of the Act, which corresponds to para. (d) of s. 50 (1) of our Ordinance, the dicta in respect of “wrongfully and without legal authority” apply with even greater force to our case under para. (a). Lindley, M.R., said (p. 266):

“. . . But it is not necessary to shew the illegality of the overt acts complained of by other evidence than that which proves the acts themselves, if no justification or excuse for them is reasonably consistent with the facts proved. This is the principle always applied in criminal prosecutions in which the words ‘feloniously’, ‘wrongfully’, or ‘maliciously’ are introduced into the charge, and have to be proved before the person accused can be properly convicted: see Archbold’s Criminal Pleadings and Evidence (19th Edn.), pp. 64 – 7. That this is the correct method of construing and dealing with the words ‘wrongfully and without lawful authority’ in s. 7 is, in my opinion, perfectly plain if attention is paid to sub-heads 1, 2, 3 and 5, to which those words are as applicable as they are to sub-head 4. If the overt acts mentioned in sub-head 1, for example, i.e. using violence or intimidation, are proved, and it is proved that they were done with a view to compel, etc., and there is no reasonable ground for justifying them,



it is unnecessary to give further evidence to prove that they were committed 'wrongfully and without legal authority': see *R. v. McKenzie*. (1) If this be true of all the sub-heads except 4 (watching and besetting), I can discover no justification for giving the words 'wrongfully and without lawful authority' any different meaning or effect when applied to 4 – namely, 'watching or besetting'."

Chitty, L.J., said (p. 271):

" 'Wrongfully and without legal authority' applies equally to all the five sub-sections; and to take (by way of illustration) the first sub-section, the using of violence, or intimidation, or injury to property, there specified, are all of them unlawful acts in themselves. No just or sound construction of the section would permit words which in terms apply to all the sub-sections being confined to one sub-section only."

Apart from the fact that it is abundantly clear from the authority above cited that in so far as para. (a) is concerned, the acts in themselves are intrinsically wrongful and without legal authority, no further proof of such being therefore necessary, s. 14 (a) of the Employment Ordinance (Cap. 366) expressly lays down that –

- "(1) No employee shall be prohibited from being or becoming a member of any trade union, or other organization, representing employees, or be subject to any penalty by reason of his membership of such trade union or organization.
- "(2) Any term or condition, whether express or implied, in any contract of service (whether such contract was entered into before or after the enactment of this section) that any employee shall not be or become a member of any trade union, or other organization, representing employees, shall be void and of no effect."

I have therefore no hesitation in finding that the act complained of in this instant case is wrongful and without legal authority within the meaning of the section. However, as already indicated, I consider this particular point to be outside the province of these proceedings, which are in respect of the interpretation of "to intimidate"; whether it is to be given the restricted meaning that it involves personal violence; on which I have ruled that it does not.

The appeal is accordingly allowed. The order of the learned magistrate acquitting the accused is set aside. The proceedings are to be returned to the district court with a direction to continue the hearing and determine the case in accordance with law.

*Appeal allowed. Order acquitting the respondent set aside. Case remitted to the district court to determine the case according to law.*

For the appellant:

*AM Troup* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

For the respondent:

*IR Vellani*

*Vellani & Co.*, Dar-es-Salaam

**Division:** High Court of Tanganyika at Mwanza  
**Date of judgment:** 26 October 1962  
**Case Number:** 129/1962  
**Before:** Reide J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Possession of property suspected of having been stolen – Accused detained in connection with housebreaking and stealing – Accused searched by village headman – Accused then taken to local court where again searched – Goods suspected of having been stolen found in possession of a second accused – Both accused then taken to police station where arrested – Both accused convicted of housebreaking, stealing and of being in possession of property suspected of having been stolen – Penal Code, s. 312 (T.) – Criminal Procedure Code (Cap. 20), s. 24 and s. 187 (1) (T.).*

### **Editor's Summary**

The two accused were convicted on three counts of housebreaking, stealing and being in possession of property suspected of having been stolen contrary to s. 312 of the Penal Code. The evidence established that the two accused were stopped by the complainant in connection with housebreaking and stealing and were taken to a village headman where they were searched. The accused were then taken to a local court, where a further search revealed a syringe and two empty penicillin bottles in the pocket of the second accused. These articles were taken from the second accused and both accused were then taken to a police station, where they were arrested. In revision, the only point in issue was whether on the evidence the magistrate was entitled to convict the accused under s. 312. For the Crown it was submitted that the second accused was guilty of an offence under s. 312 as charged on the grounds that the detention of an accused by virtue of the powers conferred under s. 24 of the Criminal Procedure Code is neither the sole pre-requisite for the bringing of the accused before the court in respect of a charge contrary to s. 312, nor even a necessary one.

### **Held –**

- (i) there was no evidence that the first accused was in possession of the syringe and two empty penicillin bottles and accordingly his conviction under s. 312 of the Penal Code was not sustainable.
- (ii) the second accused was not detained or arrested by a police officer until he was brought to the police station and when he was brought he could not be said to be conveying the articles, nor had he a possession of them ejusdem generis with conveying within the meaning of s. 312 of the Penal Code, since the articles had been taken from him earlier at the local court.
- (iii) s. 312 of the Penal Code applies only to persons who are brought before the court after having been detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code and detention in accordance with the provisions of s. 24 of the Criminal Procedure Code is a pre-requisite for a conviction under s. 312.

Conviction under s. 312 quashed and sentences set aside in respect of both accused.

**Cases referred to in judgment:**

- (1) *Saidi s/o Selemani v. Republic*, Tanganyika High Court (Mwanza) Criminal Appeal No. 288 of 1962 (unreported).
- (2) *R. v. Msengi s/o Abdullah* (1952), 1 T.L.R. (R.) 107.
- (3) *R. v. Shabani Saidi* (1943), 1 T.L.R. (R.) 77.

## Judgment

**Reide J:** The two accused, Zubaili and Boniface, were each convicted on three counts: (1) housebreaking, (2) stealing, and (3) being in possession of property reasonably suspected to have been stolen contrary to s. 312 of the Penal Code. They were each sentenced to ten, six and four months' imprisonment respectively, the terms on counts 1 and 2 being ordered to run concurrently and that on count 3 consecutively.

This order is concerned with count 3. The evidence established that the accused were stopped by the complainant (in connection with the first two counts), who took them to a village headman, where they were searched. They were then taken to a local court, where a further search revealed a syringe and two empty penicillin bottles in Boniface's pocket. It is with these articles that the third count is concerned. Both accused were then taken by a native court messenger to a police station, where they were arrested, or re-arrested. The messenger handed over the syringe and bottles to the police.

All that the magistrate said in his judgment about this count was this:

"Both accused were taken to the local court, where a further search brought to light a syringe and two penicillin bottles . . . I am also satisfied that they were found at the local court in possession of a syringe and penicillin and neither has offered any explanation."

There is nothing in the evidence, or, as far as I can see, in the statements the accused made to the police, to suggest that Zubaili was in possession of these articles, and I do not understand on what grounds he was convicted on this count. The remainder of this order is accordingly concerned with questions arising out of Boniface's conviction.

Boniface was not detained or arrested by a police officer until he was brought to the police station ("arrest" necessarily includes "detention", and the words are for the purpose of this case synonymous); and when he was so brought he could not be said, in my view, to be "conveying" the articles, nor had he a possession of them *ejusdem generis* with conveying, within the meaning of s. 312, since the articles had been taken from him earlier at the local court and were in the possession of the messenger. Even if they had still been on his person, I should have found, following my decision in *Saidi s/o Selemani v. Republic* (1), Tanganyika High Court (Mwanza) Criminal Appeal No. 288 of 1962 (unreported), that since he was already under arrest or "detention" and so not a free agent, he could not be said to be "conveying" within the meaning of s. 312.

It appears *prima facie*, therefore, that Boniface's conviction cannot be supported, since s. 312 applies only to persons who are brought before the court after having been "detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code".

Learned Crown counsel has however submitted (and I must commend the ingenuity of his argument) that Boniface may nevertheless be guilty of an offence contrary to s. 312 as charged on the grounds that the exercise of the powers conferred under s. 24 of the Criminal Procedure Code is neither the sole pre-requisite for the bringing of an accused before the court in respect of a charge contrary to s. 312, nor even a necessary one. He refers to the case of *R. v. Msengi s/o Abdullah* (2) (1952), 1 T.L.R. (R.) 107, in which the court said:

"The mere fact of the accused being before the court in possession of some articles in the circumstances covered by s. 24 of the Criminal Procedure Code vests jurisdiction in the court. If an accused is brought before the court in circumstances which justify the court in calling upon him for an explanation, it will be

difficult for him to suggest that he is not properly before the court. The reason why the police officer suspected the accused

is relevant to whether the accused was legally stopped and searched but it is not relevant to the charge itself once it has been brought before the court in exercise of the powers vested in the police by s. 24 of the Criminal Procedure Code . . .”,

and he further refers to s. 187 (1) of the Criminal Procedure Code, which reads as follows:

“When a person is charged with stealing anything and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence in respect of that thing under . . . s. 312 of the Penal Code he may be convicted of that offence although he was not charged with it.”

He submits that the wording of this sub-section indicates that the exercise of the powers conferred by s. 24 of the Criminal Procedure Code cannot be an essential pre-requisite for a charge contrary to s. 312, since a man who has been arrested on a charge of stealing will not have been subject to the exercise of the powers conferred upon the police under the provisions of s. 24.

I should like to say first that, these submissions apart, I should be very unwilling to extend the scope of s. 312 further than the law manifestly required me to. It is not only a “highly technical section”, as was remarked by Wilson, J. in *R. v. Shabani Saidi* (3) (1943), 1 T.L.R. (R.) 77, but it is one which involves an exception to the salutary rule of law whereby the onus of proving guilt lies throughout on the prosecution, in that the burden of furnishing to the court a credible explanation of his possession of the suspected articles, is here thrown upon the accused.

Secondly, I cannot agree that the provisions of s. 187 (1) of the Criminal Procedure Code may be so construed, as in effect to enable a court in certain circumstances to convict a person originally charged with theft of an offence contrary to s. 312 of the Penal Code without being satisfied that he was “detained” under the powers conferred by s. 24 of the Criminal Procedure Code; or that “detention” in accordance with the provisions of that section is not a pre-requisite for a conviction under s. 312. I apprehend that the sort of case where a person charged with stealing might be convicted of conveying under the provisions of s. 187 (1) might arise where e.g. a constable has arrested a man carrying an article which the constable believes to be the property of X; at the trial for the theft of the article it becomes clear that the article is not X’s and that its provenance is unknown, but the accused, nevertheless, is unable to give a credible account of his possession to the magistrate. (Section 312 is never applicable in the case of property which can be identified as that of a known individual: per Wilson, J. (*R. v. Shabani Saidi* (3).) I do not think that the provisions of s. 187 (1) were intended to go further than a case of this sort, and I am very glad that that should be so. If learned Crown counsel’s submissions were correct, then a person charged with a theft for which no sufficient evidence could be brought before the court to secure his conviction, and who had been arrested in no matter what circumstances, would nevertheless stand in peril of conviction for conveying contrary to s. 312, whenever the ownership of the article in question could not be, or was not known; the special pre-requisite concerning s. 24 of the Criminal Procedure Code being then entirely ignored.

I do not believe that such a startling extension of the exceptional requirement thrown upon the accused in proceedings instituted under s. 312 to give an account of his possession to the satisfaction of the court, is desirable, or that it has been effected by the terms of s. 187 (1) of the Criminal Procedure Code.

I am fortified in my opinion by a perusal of the judgment in *Msenge’s* case (2). There is nothing in that judgment to suggest that a conviction under s. 312 can

be supported where the pre-requisites of s. 24 have not been satisfied, and it will be seen that in the passage which I have quoted, the court has twice referred to s. 24 in terms which leave no doubt that though

“if an accused is brought before the court in circumstances which justify the court in calling upon him for an explanation, it will be difficult for him to suggest that he is not properly before the court”,

yet to be “properly before the court” he must have been brought there “in the circumstances covered by s. 24 of the Criminal Procedure Code”.

Accordingly, I now quash the conviction in respect of both accused on the third count of conveying contrary to s. 312 of the Penal Code, and set aside the sentence.

*Conviction under s. 312 quashed and sentences set aside in respect of both accused.*

For the Crown:

*Norman D Macleod* (Crown Counsel, Tanganyika)

*The Attorney-General* Tanganyika

The appellant did not appear and was not represented.

**The Khoja Shia Ithna-Asheri Jamaat of Tabora v  
The Tabora Town Council**  
[1963] 1 EA 20 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 4 December 1962                           |
| <b>Case Number:</b>      | 1/1962                                    |
| <b>Before:</b>           | Mosdell J                                 |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Limitation of action – Appeal – Application for leave to appeal out of time – Period for filing appeal prescribed by Local Government (Rating) Ordinance (Cap. 317) – Whether Indian Limitation Act, 1908, s. 5 can be invoked – Local Government (Rating) Ordinance (Cap. 317), s. 10 and s. 11 (T.) – Indian Limitation Act, 1908, s. 3, s. 5 and s. 29 – Indian Code of Civil Procedure, 1908, s. 151.*

[2] *Rates – Appeal – Application to admit appeal out of time – Period for filing appeal prescribed by Local Government (Rating) Ordinance (Cap. 317) – Whether Indian Limitation Act, 1908, s. 5 can be invoked – Local Government (Rating) Ordinance (Cap. 317), s. 10 and s. 11 (T.) – Indian Limitation Act, 1908, s. 3, s. 5 and s. 29 – Indian Code of Civil Procedure, 1908, s. 151.*

**Editor’s Summary**

Some time after the valuation court of Tabora Township had given its decision relating to objections to the first draft valuation roll for 1962 for Tabora Township a notice appeared in the Tanganyika *Gazette* dated April 27, 1962, pursuant to s. 10 of the Local Government (Rating) Ordinance wherein it was stated (*inter alia*) that the said draft valuation roll would become fixed and binding upon all parties concerned unless, within thirty days from the publication of this notice, appeal was made against the decision of the valuation court. The appellant's advocate, relying on this advertisement, filed an appeal against the decision of the valuation court having no knowledge that a similar advertisement had been published on April 20, 1962. Section 10 of the Ordinance provides that such an appeal should be made within thirty days from the date of the first publication of the advertisement and the appellant was thus seven days out of time in filing the appeal. On an application by the appellant for



leave to appeal out of time it was submitted that the appellant's advocate had been misled in computing the time within which an appeal had to be filed by the second notice and that that constituted sufficient cause for an extension of the time to be granted under s. 5 of the Indian Limitation Act. For the respondent it was submitted that s. 5 of the Indian Limitation Act could not be invoked by reason of the provisions of s. 3 and s. 29 of the Act.

**Held –**

- (i) the words “and such appeal shall be conducted as nearly as may be in conformity with the law and practice for the time being in force relating to appeals in civil cases from a subordinate court”. in s. 11 (1) of the Local Government (Rating) Ordinance necessarily imply that the provisions of the Indian Civil Procedure Code and the Indian Limitation Act shall be applicable to appeals from decisions of a valuation court.
- (ii) the provisions of the Local Government (Rating) Ordinance do not amount to a complete code as to limitation and accordingly s. 5 of the Indian Limitation Act could be invoked by the intended appellant.
- (iii) the appellant had shown sufficient cause for not preferring the appeal within the period laid down in s. 10 (3) of the Ordinance and accordingly the application for leave to appeal out of time under s. 5 of the Indian Limitation Act should be granted.

Application allowed.

**Cases referred to in judgment:**

- (1) *Dropadi v. Hiralal* (1912), 34 All. 496.
- (2) *Waryan Singh v. Wadhaba* (1918), A.I.R. Lah. 372.
- (3) *Beni Prasad Kauri v. Dharaka Rai* (1901), 23 All. 277.

**Judgment**

**Mosdell J:** This is an application by the Khoja Shia Ithna-Asheri Jamaat of Tabora (hereinafter called “the intended appellant” for leave to appeal out of time against the decision of the valuation court of Tabora Township (hereinafter referred to as “the intended respondent”) in which the intended respondent held that certain property owned by the intended appellant was rateable under the Local Government (Rating) Ordinance (Cap. 317) (hereinafter called “the Ordinance”). In an affidavit supporting the application sworn by Mr. Versi, the advocate for the intended appellant, Mr. Versi, deposed that upon perusal on April 28, 1962, of the Tanganyika *Gazette* of the day before he noticed a General Notice No. 969 entitled “In the Valuation Court of Tabora Township” wherein it was stated *inter alia* that the first draft valuation roll for 1962 for the Tabora Township would become fixed and binding upon all parties concerned

“unless within thirty days from the date of publication of this notice appeal is made against the decision of the valuation court in the manner provided in s. 11 of the Local Government (Rating) Ordinance, 1952”.

Being instructed to lodge an appeal against the decision of the intended respondent, Mr. Versi deposed that he made a note of the time limit within which the appeal had to be made, and he filed the

memorandum of appeal on May 26, 1962, that is to say one day within the period specified in the general notice hereinbefore mentioned.

Mr. Versi further deposed that on July 24, 1962, Mr. Master informed him on the telephone that he might take a preliminary point at the hearing of the appeal, which had been listed for July 25, 1962, that it was time-barred by

virtue of a notice having appeared in the *Tanganyika Gazette* of April 20, 1962, in identical terms with the notice which appeared in the *Tanganyika Gazette* of April 27, 1962.

Mr. Versi further deposed that until July 24, 1962, he had no knowledge that such a notice had appeared in the *Tanganyika Gazette* of April 20, 1962, and that, since no reference was made in the notice which appeared in the *Gazette* of April 27, 1962, to a previous one having appeared the week before, he was misled in ascertaining and/or computing the prescribed period of limitation for the filing of an appeal, and that for these reasons the appeal was not filed within the period prescribed in the notice appearing in the *Tanganyika Gazette* of April 20, 1962.

After submitting that the notice which appeared in the *Tanganyika Gazette* of April 27, 1962, was bad in law and was liable to be and had in fact been misconstrued and/or misunderstood, and that an interesting point of fact and law of public importance was involved in the proposed appeal, he prayed that the period within which the appeal should have been made be extended, or, in the alternative, that the intended respondent be ordered to publish or cause to be published in the *Tanganyika Gazette* fresh notices clearly indicating the time within which appeal from its decisions be lodged in compliance with s. 11 (1) of the Ordinance.

At the hearing of the application Mr. Versi stated that he was making the application under s. 5 of the Indian Limitation Act, 1908 (hereinafter called “the Limitation Act”) and s. 151 of the Indian Civil Procedure Code. It is convenient to deal with the matter of limitation first, but before doing so it is necessary to set forth the relevant provisions of s. 10 and s. 11 of the Ordinance. Section 10 reads as follows:

- “10. (1) . . .
- “(2) . . .
- “(3) The clerk to the valuation court shall cause to be inserted in the *Gazette* and in at least one newspaper (if any) circulating in the municipality not less than twice within a period of ten days . . . an advertisement informing all persons interested in the coming into operation of the valuation roll that that the same will become fixed and binding upon all parties concerned who shall not, before a date fixed in the notice not being less than thirty days from the date of the first publication of the aforesaid advertisement, appeal against the decision of the valuation court in the manner provided in s. 11.”

Section 11 reads as follows:

- “11. (1) any person who feels himself aggrieved by any decision of the valuation court may, before the date fixed by the notice published under the provisions of sub-s. (3) of s. 10, appeal to the High Court against the same, and such appeal shall be conducted as nearly as may be in conformity with the law and practice for the time being in force relating to appeals in civil cases from a subordinate court.”

Mr. Versi submitted that he was misled in computing the time by which an appeal had to be filed by the second notice, and he submitted that that was sufficient cause for an extension of the time within which an appeal had to be filed under s. 5 of the Limitation Act.

The first point for decision is whether s. 5 of the Limitation Act can be called in aid in the circumstances of the instant case. Mr. Master submitted that it could not by reason of the provisions of s. 3 and s. 29 of the Limitation Act, which read as follows, so far as is relevant:

“3. Subject to the provisions generally in s. 4 to s. 25 inclusive, every suit instituted, appeal preferred and application made after the period of limitation prescribed therefore by the First Schedule shall be dismissed although limitation has not been set up as a defence.”

“29. (1) Nothing in this Act shall –

(a) . . .

(b) affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India.

(2) . . .

(3) . . .”

Section 5 *ibid.* reads as follows:

“5. Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefore, when the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

“*Explanation:* The fact that appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.”

Mr. Master submitted that as the period of limitation was specifically laid down in sub-s. (3) of s. 10 and sub-s. (1) of s. 11 of the Ordinance, being the local law, s. 5 of the Limitation Act was inapplicable. Mr. Versi submitted, on the other hand, that the wording of sub-s. (1) of s. 11 of the Ordinance,

“and such appeal shall be conducted as nearly as may be in conformity with the law and practice for the time being in force relating to appeals in civil cases from a subordinate court”,

by implication made the provisions of the Indian Civil Procedure Code and the Limitation Act applicable in the instant case. Mr. Versi referred to Chitaley, *Limitation Act* (1938 Edn.), Vol. I, p. 913 et seq., wherein it is stated:

“In the interpretation and application . . . of sub-s. (1) (b) of s. 29 of the Act of 1908 before its amendment into its present form” (this relates to an amendment made by the Indian Limitation (Amendment) Act, 1922, which does not apply to Tanganyika) “there was a conflict of judicial opinions. According to one view the general sections of the Limitation Act could not be applied to the periods of limitation fixed by the special or local laws. The reason given in some cases for the said view was that where the special or local law was a complete code recourse could not be had to the section of the Limitation Act; other cases supported the view on the ground that, independent of the question whether the special or local law was a complete code or not, the effect of the application of the general provisions of the Limitation Act would be to ‘affect or alter’ the period so prescribed. According to the second view the general provisions of the Limitation Act would be applicable to periods prescribed by the special or local law if such laws were not complete codes in themselves, the reason given being that the words ‘affect or alter’ related only to the period prescribed and not to the computation of such period.”

Mr. Versi submitted alternatively that the Ordinance was not a complete code as to limitation and he could therefore call in aid s. 5 of the Limitation Act, and he cited three cases in support of the latter proposition mentioned in Chitaley, op. cit. in note (1) to s. 29, namely, *Dropadi v. Hiralal* (1) (1912), 34 All. 496; *Waryan Singh v. Wadhwa* (2) (1918), A.I.R. Lah. 372; and *Beni Prasad Kauri v. Dharaka Rai* (3) (1901), 23 All. 277.

I think the answer to the question whether s. 5 of the Limitation Act can be invoked by the intended appellant does not depend upon whether the Ordinance provides a complete code as to limitation. I interpret the words in sub-s. (1) of s. 11 of the Ordinance

“and such appeal shall be conducted as nearly as may be in conformity with the law and practice for the time being in force relating to appeals in civil cases from a subordinate court”

as necessarily implying that the provisions of the Civil Procedure Code and the Limitation Act shall be applicable to appeals from decisions of a valuation court.

Mr. Master submitted that s. 151 of the Civil Procedure Code was a procedural section and did not affect substantive provisions of law, and that the provisions of s. 151 *ibid.* did not override the provisions of the Limitation Act. That is perfectly true, but, as I understood him, Mr. Versi was not invoking the provisions of s. 151 of the Civil Procedure Code to support his submission that s. 5 of the Limitation Act was applicable in the instant case. He was invoking its provisions in seeking to obtain an order that the intended respondent publish or cause to be published fresh notices complying with the terms of sub-s. (3) of s. 10 of the Ordinance. But even if I am wrong in deciding that the words of sub-s. (1) of s. 11 of the Ordinance above quoted do plainly bring into play the provisions of the Limitation Act, in my view the provisions of the Ordinance do not amount to a complete code as to limitation, and that for the latter reason also s. 5 of the Limitation Act can be invoked by the intended appellant.

The question arises now as to whether the intended appellant has satisfied the court that he had sufficient cause for not preferring the appeal within the period laid down in sub-s. (3) of s. 10 of the Ordinance. Mr. Versi submitted that not only was he misled by the general notice which appeared in the *Tanganyika Gazette* of April 27, 1962, by reason of the fact that it stated that an appeal should be made within thirty days from the date of its publication, that is to say April 27, 1962, but also that the wording of the notice did not comply with the requirements of sub-s. (3) of s. 10 of the Ordinance. Mr. Versi submitted that the words in the notice

“unless within thirty days from the date of publication of this notice appeal is made . . .”

did not comply with the words of sub-s. (3) of s. 10 of the Ordinance –

“ . . . parties concerned who shall not before a date fixed in the notice, not being less than thirty days from the date of the first publication of the aforesaid advertisement, appeal . . .”

As to Mr. Versi being misled, Mr. Master submitted that the number of the General Notice in the *Tanganyika Gazette* of April 27, 1962, namely, 969, being placed between General Notice No. 1014 and General Notice No. 1015, should have put Mr. Versi on his guard as indicating that General Notice 969 had previously appeared in the *Tanganyika Gazette* of an earlier date. As to the wording of the notice, Mr. Master submitted that it adequately complied with the requirements of sub-s. (3) of s. 10 of the Ordinance.

As to the former of the two latter submissions, Mr. Versi pointed out that the number of the notice was no concern of his. It was a matter for the editor of the *Tanganyika Gazette*. He was only concerned with the wording of the notice. This submission appears to me to be a valid one. Moreover, the notice stating

“unless within thirty days from the date of publication of this notice appeal is made”

does not appear to me to comply with the provisions of sub-s. (3) of s. 10 of the Ordinance, as “within thirty days” is not a date fixed in the notice not being less than thirty days from the date of the first publication of the notice. Indeed had such a date been fixed in the notice the difficulties in which the intended appellant finds himself would not have arisen.

In my view, therefore, sufficient cause has been shown by the intended appellant for not preferring the appeal within the period of limitation prescribed. This ground alone would be sufficient for me to grant the application of the intended appellant to appeal out of time, but I think I must deal with the prayer that the intended respondent be ordered to publish or cause to be published in the *Tanganyika Gazette* fresh notices, though this order is only sought in the supporting affidavit and not in the application itself. In my view, for the reasons already stated, the notices were bad, but quite apart from the question as to whether s. 151 of the Civil Procedure Code would empower me to, I do not propose to order the intended respondent to publish or cause to be published in the *Tanganyika Gazette* fresh notices, as the proceedings of the intended respondent as a whole are not being impugned, and I, therefore, restrict myself to making an order which will allow the intended appeal to be made out of time – which is what the intended appellant is really seeking. The wording of the application is not strictly correct in that what the intended appellant should be seeking is not leave to appeal out of time but an order that its appeal be admitted after the period of limitation prescribed therefore in sub-s. (3) of s. 10 of the Ordinance has expired.

For the reasons given earlier herein I, therefore, order that the appeal be admitted. Costs of this application to be costs in the cause.

*Application allowed.*

For the appellants:

*BAS Versi*

*Desai & Co., Dar-es-Salaam*

For the respondent:

*KA Master QC and GS Patel*

*KA Master & Co., Dar-es-Salaam*

**Chaganlal J Ganatra and another v Uganda  
Electricity Board  
[1963] 1 EA 26 (HCU)**

**Division:** HM High Court of Uganda at Kampala

**Date of judgment:** 21 September 1962

**Case Number:** 46/1962

**Before:** Sheridan J

**Sourced by:** LawAfrica

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*[1] Practice – Transfer of suit – Application to transfer suit from district court to High Court – Combined amount of claim and counterclaim exceeding pecuniary jurisdiction of district court – Whether suit should be transferred to High Court – Indian Civil Procedure Rules, O. VIII, r. 6 (1) – Civil Procedure Rules, O. 8, r. 8 (U.).*

### Editor's Summary

The defendant applied for transfer of the suit from the district court to the High Court on the ground that the total amount of the claim, namely, Shs. 2,000/- and of the counterclaim, namely, Shs. 1,252/- together exceeded the pecuniary jurisdiction of the district court, namely, Shs. 3,000/ – .

**Held** – as each of the respective amounts of the claim and the counterclaim was within the jurisdiction of the district court, it was immaterial that the combined amount of the two claims was beyond its jurisdiction, and accordingly the application for transfer of the suit should be dismissed.

Application dismissed.

### Case referred to:

(1) *Manibhai Lakhabhai Patel v. Bisansingh Jairalsingh* (1918), 2 U.L.R. 270.

### Judgment

**Sheridan J:** This is an application to transfer proceedings from the district court to the High Court. The respondents/plaintiffs brought a suit claiming Shs. 2,000/- as damages. The applicants/defendants counterclaimed for Shs. 1,252/- and Mr. Pinto, on their behalf, relying on the judgment of Kingdon, Ag. C.J., in *Manibhai Lakhabhai Patel v. Bisansingh Jairalsingh* (1) (1918), 2 U.L.R. 270 submits that, as the total amount of the claim and counterclaim exceeds the pecuniary jurisdiction of the district court, the suit must be transferred to the High Court. That judgment was delivered as long ago as 1918 and with respect I doubt its correctness. It is true that there a set-off and not a counterclaim was pleaded and it was held that if the set-off when added to the plaintiff's claim will exceed the pecuniary limit the defendant has the option of abandoning a portion of his claim so as not to exceed the limit, or of bringing his claim in a separate suit. In my view the Indian authorities cited by the learned judge do not support this proposition. They go no further than deciding that a court cannot entertain the question of a set-off if the amount claimed by the defendant exceeds the amount cognisable by it. This point is not specifically covered by the Civil Procedure Rules but the Indian Code of Civil Procedure, O. VIII, r. 6 (1) provides:

“Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the

suit, but not afterwards unless permitted by the court, present a written statement containing the particulars of the debt sought to be set-off.”

The commentary on this provision in Chitaley (Vol. 2) (6th Edn.), p. 2405 is

“Where both the amount of claim and the value of the set-off are each within the jurisdiction of the court, it is immaterial that the *combined amount* of the two claims is beyond its jurisdiction”.

A fortiori in the case of a counterclaim which is a cross-action (Civil Procedure Rules, O. 8, r. 8). For these reasons the application is dismissed with costs.

*Application dismissed.*

For the plaintiff:

*MA Haque*

*Haque, Dalal & Singh*, Kampala

For the defendant:

*SA Pinto*

*SA Pinto*, Kampala

## **Mohamed Farah v R** [1963] 1 EA 27 (CAN)

**Division:** Court of Appeal at Nairobi  
**Date of judgment:** 16 January 1963  
**Case Number:** 164/1962  
**Before:** Sir Ronald Sinclair P, Crawshaw and Newbold JJA  
**Sourced by:** LawAfrica  
**Appeal from:** H.M. Supreme Court of Kenya – Miles, J

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*[1] Criminal law – Evidence – Evidence of whereabouts of place of commission of alleged offence – “Proclaimed area” – Failure of prosecution to produce copy of Proclamation or to prove that locus in quo was within the area – Judicial notice of location of towns and villages within jurisdiction – Stock and Produce Theft Ordinance, s. 10 (1) (K.).*

### **Editor’s Summary**

The appellant was convicted under s. 10 (1) of the Stock and Produce Theft Ordinance of being in possession of stock reasonably suspected of being stolen within a proclaimed area, namely, at Eldera, within the Isiolo District of the Northern Province. At the trial no evidence was led to show that Eldera



was within the Northern Province and that the Northern Province had been declared a proclaimed area for the purposes of s. 10 (1) of the Ordinance. The appellant's appeal to the Supreme Court was summarily dismissed and on further appeal to the Court of Appeal,

**Held –**

- (i) the fact that stock proved to have been stolen was found in the appellant's possession was not conclusive evidence that it had not been lawfully obtained by him for, although the onus under the Stock and Produce Theft Ordinance was on the appellant to show that his possession was lawful, it was open to the appellant to show that he came by the stock innocently with no knowledge or reason to believe that it had been stolen, in which event he would have been entitled to an acquittal.

*Chebusit A'Kalia v. R.*, Kenya Supreme Court (Kisumu) Criminal Appeal No. 63 of 1961 (unreported) approved.

- (ii) the appellant had not proved affirmatively that his possession of the stock was lawful and, as the onus was on him to do so, the appeal against conviction could not succeed.
- (iii) where an offence is charged as having taken place in a "proclaimed area" evidence of the whereabouts of the place concerned should be led and the

proclamation declaring the area to be a proclaimed area should be proved by the production of the relevant *Gazette* notice.

- (iv) notwithstanding that the prosecution at the trial had omitted to produce the relevant *Gazette* notice or to prove that the locus in quo was within the proclaimed area, the appellant having taken no objection to the geographical particulars of the charge or to the non-production of the notice and the court having satisfied itself in the matter, the appeal was dismissed.

Appeal dismissed.

### Cases referred to in judgment:

- (1) *Chebusit A'Kalia v. R.*, Kenya Supreme Court (Kisumu) Criminal Appeal No. 63 of 1961 (unreported).
- (2) *Saleh Mohamed v. R.* (1953), 20 E.A.C.A. 141.
- (3) *Kuruma s/o Kaniu v. R.* (1955), 22 E.A.C.A. 364.
- (4) *Dedan Mugo s/o Kimani v. R.* (1951), 18 E.A.C.A. 139.

### Judgement

**Crawshaw JA:** read the following judgment of the court: The appellant was charged as follows:

“Being in possession of stock reasonably suspected of being stolen within a proclaimed area contrary to s. 10 (1) Stock and Produce Theft Ordinance, Chapter 206, Laws of Kenya, 1948, as read with Proclamation No. 105 of 1953.

“Mohamed Farrah: On the 7th day of December, 1961, at about 10.00 a.m. at Eldera within the Isiolo District of the Northern Province was found in possession twenty-one head of cattle reasonably suspected of being stolen within an area proclaimed by Governor in Council to be a proclaimed area.”

The appellant was convicted of the offence charged in the magistrate’s court at Isiolo and sentenced to three years’ imprisonment.

The appellant appealed to the Supreme Court against the conviction and sentence. The learned judge before whom the appeal came dismissed the appeal summarily, and the appellant has now appealed to this court. The grounds of appeal before us are the same as those before the lower court. In his memoranda of appeal before both courts the appellant reiterates the evidence he gave before the magistrate that he had purchased the cattle concerned on August 15, 1961, and refers to the prosecution evidence that the cattle had been stolen in October. He said in his memoranda,

“I feel that my case should be reconsidered as these Samburus stated their cattle were stolen on October 3 (in the memoranda of appeal to us wrongly said to be October ‘23’), 1961, whereas during these periods I was in Isiolo together with my cattle and to prove this my witnesses are: . . .”;

he then gives the names of three persons and complains that the magistrate did not call them. He also complains that two other persons were not produced in court because they were not available in Isiolo, who could have given evidence of his purchase of the cattle. At his trial the appellant called one other witness, whose evidence was no help to him, and the magistrate at the close of the defence recorded the following,

“Accused states that he has no further witnesses to call and that he has nothing further to say in his defence”.

There would therefore appear to be no merit in that part of the appeal which complains of the appellant not being allowed or able to call witnesses.

As to the date of the theft, the learned magistrate said:

“It has been proved beyond reasonable doubt –

(i) There was a theft of Samburu cattle in October.

....”

The magistrate did not expressly say that he considered the appellant was lying when he said he had bought the cattle in August, nor was it put to the appellant in cross-examination or by the court that such evidence was inconsistent with the prosecution evidence. It was desirable that this should have been done, especially in the case of a class of person such as the appellant, who was not represented, and who might not have been reliable where dates were concerned. His memoranda of appeal however make it clear that there is no need for doubt that he knew that the date he said he had bought the cattle was earlier than the date they were stolen. This being so, no court could find that he had proved affirmatively that his possession was lawful, the onus so to do being on him by virtue of s. 10 (1) of the Stock and Produce Theft Ordinance, Cap. 206, of the 1948 revised laws.

We felt some doubt from the magistrate’s judgment whether he properly understood the meaning of “lawfully obtained”; it seemed to us that he might have thought that, it having been proved the cattle had been stolen, they could not have been lawfully obtained by the appellant, or anyone else without the owner’s consent. That, of course, is not so, and in case the magistrate should have been under any misapprehension we would refer him to the case of *Chebusit A’Kalia v. R.* (1), Kenya Supreme Court (Kisumu) Criminal Appeal No. 63 of 1961 (unreported), where in considering s. 10 (*supra*) a bench of three judges of the Supreme Court said of an accused,

“he would be entitled to acquittal if he could show that he came by the stock innocently with no knowledge or reason to believe that it had been stolen and in circumstances which did not amount to any offence”;

with this passage we agree.

No evidence was led to show that Eldera was in a proclaimed area. In *Saleh Mohamed v. R.* (2) (1953), 20 E.A.C.A. 141 this court said at p. 142:

“We think that the learned judge in the court below stated the position too widely when he held that a magistrate was entitled to have judicial knowledge of the location of all the towns and villages in Kenya . . . We think, therefore, that it would have been better had the prosecution produced evidence as to the whereabouts of the place Mumias because it was of the essence of this particular charge that the sugar had been found in the appellant’s possession at a place which lay within a prohibited area.”

It was the essence also of the instant charge that Eldera was in a proclaimed area. In *Kuruma s/o Kaniu v. R.* (3) (1955), 22 E.A.C.A. 364 the Privy Council was apparently referred to the first part of the above quotation and observed at p. 366 that not having read the decision in that case they were reluctant to criticise it but that the words referred to constituted perhaps “an unduly narrow view”. They thought,

“it may well be that when an indictment alleges that a particular offence was committed at a particular place and no challenge or issue is raised at the trial on that point the court may assume or at least take judicial knowledge that the place is situate where the indictment states it is or that the maxim omnia praesumuntur rite esse acta would apply”.

In the case of *Saleh Mohamed* (2), this court in fact took a view similar to that of the Privy Council and held that there had been no failure of justice, counsel for the defendant having taken no objection to the geographical particulars in the charge. In the instant case no objection was taken either, but we agree with what was said in the case of *Saleh Mohamed* (2), that it would have been better had evidence been led as to the whereabouts of the place concerned (in this case Eldera), especially as the appellant was unrepresented. The fact that Eldera was in the Northern Province has not been challenged at any stage, but we have taken the precaution of satisfying ourselves that it is.

The court should also have been referred by the Crown to the Proclamation declaring the district in the charge to be a proclaimed area, although this has not been challenged by the defence. In *Dedan Mugo s/o Kimani v. R.* (4) (1951), 18 E.A.C.A. 139 this court said at p. 142 in relation to Government Notices,

“it is clearly the proper practice in such cases for the prosecution to produce the relevant *Gazette* to the trial court, and this should always be done in future”.

We have however before us Legal Notice No. 105 of 1933 in which the Northern Frontier Province is declared to be a proclaimed area.

We do not think this was a case in which the Supreme Court should summarily have dismissed the appeal. For the reasons we have given, however, we think the appeal was not entitled to succeed and the appeal to us against conviction is accordingly dismissed. It being a second appeal, no appeal lies against sentence.

*Appeal dismissed.*

The appellant in person.

For the respondent:

*GA Twelftree* (Ag. Senior Crown Counsel, Kenya)

*The Attorney-General, Kenya*

**Abdi Bin Ali Noor v R**  
**[1963] 1 EA 30 (SCK)**

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|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 15 October 1962                      |
| <b>Case Number:</b>      | 763/1962                             |
| <b>Before:</b>           | Rudd Ag CJ and Edmonds J             |
| <b>Sourced by:</b>       | LawAfrica                            |

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[1] *Criminal law – Security for maintaining good behaviour – Bond for maintaining good behaviour and in default forfeiture signed by accused – Subsequent complaint against accused of being drunk and abusive in a public place – Complaint found to be true after trial – Order for forfeiture of first bond and*

*execution of another – Whether power to require execution of second bond – Criminal Procedure Code (Cap. 27), s. 47 and s. 53 (K.).*

### **Editor's Summary**

In June, 1962, pursuant to an order under s. 53 of the Criminal Procedure Code the appellant had signed a bond to be of good behaviour for a period of six months and in case of his making default therein he bound himself to forfeit to the Crown a sum of Shs. 200/-. In addition one surety in the sum of Shs. 100/- was required and duly given. The appellant was brought before a magistrate in July, on a complaint that the appellant had been drunk and abusive in a bar and that the amounts in the bonds should be forfeited, and the magistrate, after hearing evidence, found the complaint to be true. The magistrate directed that the said sums of Shs. 200/- and Shs. 100/- respectively should be forfeited and in default thereof that the appellant should be committed to prison for two months, and the magistrate also directed the appellant to execute a further

bond in the sum of Shs. 500/- conditioned that he should keep peace and be of good behaviour for a period of one year. On appeal,

**Held** – the object of the complaint and the trial of the issues raised thereby was limited to the point as to whether or not the amounts specified in the original bonds should be forfeited, and accordingly, although the magistrate was entitled to order the forfeitures under the original bonds, he had no power to require the appellant to enter into a fresh bond.

Appeal dismissed save that the order for executing second bond was set aside.

### **Judgement**

**Rudd Ag CJ:** read the following judgment of the court: The facts of this case were as follows: on June 25, 1962, pursuant to an order under s. 53 of the Criminal Procedure Code, the appellant signed a bond to be of good behaviour to Her Majesty the Queen and all her subjects for a term of six months and in case of his making default therein he bound himself to forfeit to Her Majesty the sum of Shs. 200/-. In addition to his own bond as aforesaid one surety in the sum of Shs. 100/- was required and duly given.

On July 11 the appellant was brought before the magistrate for failing to comply with this bond on a complaint to the effect that on July 9, 1962, the appellant went to a certain bar and threw a bottle on the floor, refused to leave the bar when so requested, assaulted the barmaid and refused to pay for the bottle of beer which he had smashed. The appellant denied these allegations and the issues raised went to trial on July 19, 1962, when the magistrate found that the appellant had been drunk and abusive and had struggled with the barmaid and torn her dress. These findings were fully supportable on the evidence. The magistrate directed that the sums of Shs. 200/- and Shs. 100/- respectively should be forfeited by the appellant and his surety in respect of the bond. He directed that in default of payment by July 23 the appellant should be committed to prison for two months and, in addition, directed the appellant to execute a further bond in the sum of Shs. 500/- without sureties conditioned that he should keep the peace and be of good behaviour for a period of one year. The appellant appealed.

We think that as regards the forfeitures ordered in respect of the original bond the appeal should be dismissed but there was no power in the circumstances to require the appellant to enter into a fresh bond. The object of the complaint and the trial of the issues raised thereby was limited to the point as to whether or not the amounts specified in the original bond should be forfeited. These proceedings were not proceedings brought with a view to obtaining a conviction and sentence in respect of the facts alleged in the complaint. They were purely for the purpose of enforcing the obligation of the bond. The appellant was not required to show cause as to why he should not be required to enter into a further bond. The provisions of s. 47 of the Criminal Procedure Code were not complied with in regard to such a requirement.

In the circumstances the requirement that the appellant should enter into a bond in the sum of Shs. 500/- for one year is set aside. Any bond made by the appellant under this part of the order appealed from is declared to be null and void. In all other respects the appellant's appeal is dismissed.

*Appeal dismissed save that the order for executing second bond was set aside.*

The appellant did not appear and was not represented.

For the respondent:  
*JR Hobbs* (Crown Counsel, Kenya)  
*The Attorney-General, Kenya*

**John Granville Hornsted v Mabel Iris Hornsted**  
**[1963] 1 EA 32 (HCT)**

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 7 February 1963  
**Case Number:** 5/1962  
**Before:** Spry J  
**Sourced by:** LawAfrica

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*[1] Costs – Security for costs – Divorce – Application by respondent wife to take her evidence on commission out of the jurisdiction – Security for costs of and incidental to taking evidence on commission – Indian Code of Civil Procedure, 1908, s. 77 – Indian Civil Procedure Rules, O. XXVI, r. 15 – Matrimonial Causes Rules, 1956, r. 25 (3), r. 67 (1) and (2) (T.) – Matrimonial Causes Ordinance (Cap. 364), s. 3 (T.).*

**Editor's Summary**

The respondent applied for the issue of a letter of request for her evidence to be taken on commission in England under s. 77 of the Indian Code of Civil Procedure and for an order for security for the costs of and incidental to the taking such evidence. Prior to this application the respondent had applied under r. 67 (2) of the Matrimonial Causes Rules, 1956, for security for costs of the proceedings but in the bill of costs filed for taxation had not included provision for the expenses of procuring evidence of the respondent on commission. For the petitioner it was submitted that the respondent was not entitled for an order for security for costs under O. XXVI, r. 15 of the Indian Civil Procedure Rules which empowers the court before issuing a commission to order payment into court of a reasonable sum for expenses by the party “at whose instance or for whose benefit the commission is issued”.

**Held –**

- (i) the application for security for the costs of and incidental to taking evidence on commission should have been made under r. 25 (3) and r. 67 (1) of the Matrimonial Causes Rules, 1956, and not under s. 77 of the Indian Code of Civil Procedure.
- (ii) the provisions of r. 67 (i) *ibid.* should prevail over those of s. 77 of the Indian Code of Civil Procedure.
- (iii) although the respondent had previously filed a bill of costs for taxation under r. 67 (2) he was not precluded, when applying for an order to take evidence on commission, from seeking an order under s. 67 (1) for the security of costs of and incidental to the taking of such evidence.



Application allowed.

### **Judgement**

**Spry J:** This is an application under s. 77 of the applied Indian Code of Civil Procedure, 1908, for the issue of a letter of request to the Supreme Court of Judicature of England for the examination of the applicant, who is the respondent in the main proceedings, brought by her husband for the dissolution of their marriage, in which she has filed an answer and cross-petition. The applicant also asks for an order for security for the costs of and incidental to the examination.

The first part of the application presents no difficulty and is not opposed. It is obvious that the wife's evidence is both material and essential. It would have been preferable for her to have given evidence before the judge who hears the petition but this would add enormously to the costs of proceedings in which both parties are of limited means. The applicant is, and has at all material times been, resident in England, so that there is no question of her seeking to evade a personal appearance.

I accordingly order that a letter of request do issue as prayed.

As regards the second part of the application, Mr. Lockhart-Smith, for the respondent/petitioner, opposed the application for security for costs. He submitted that although the application is made under s. 77, which provides for letters of request, the principles of O. XXVI of the First Schedule to the applied Indian Code of Civil Procedure, 1908, which relates to commissions, should apply, and he particularly referred to r. 15, which empowers the court before issuing a commission to order payment into court of a reasonable sum for expenses by the party "at whose instance or for whose benefit the commission is issued". He argued that in principle it is unfair for one party to ask for a commission and expect the other party to pay. If he is ordered to give security, the respondent/petitioner will have to pay in any event; even if he succeeds and obtains an order for costs in the cause, it will be unless to him as on her own submissions the applicant will be unable to pay.

In extension of this argument and in reply to arguments put forward by Mr. Thornton, Mr. Lockhart-Smith further argued that the English rules have no application here and that the court must look to the Indian Code of Civil Procedure, which points in the opposite direction.

Mr. Lockhart-Smith further argued that the applicant has already made an application under r. 67 of the Matrimonial Causes Rules, 1956, and filed for taxation a bill of costs which did not include provision for the expenses of procuring the evidence of the applicant. He did not then ask for the costs of a commission and it is now too late for him to do so.

Mr. Thornton's submission was that the respondent/petitioner had chosen the forum. The marriage had been in England, the matrimonial home had been in England and the applicant and her child had never left England. Her evidence is essential to the proceedings and the cheapest way of obtaining it is on commission but she herself has no means. Mr. Thornton relied particularly on the general practice that in the absence of special circumstances, no order for costs is made against a wife, even if she is unsuccessful. He submitted that O. XXVI, r. 15, is discretionary, and is inappropriate to matrimonial proceedings.

I think that Mr. Thornton was in error in the first place in making his application under s. 77. It seems to me that he should have applied under r. 25 (3) and r. 67 (1) of the Matrimonial Causes Rules, 1956, and that had he done so, most of the apparent difficulties would not have arisen. For some reason unknown to me, neither of these sub-rules was referred to in argument. Furthermore, no reference was made to s. 3 of the Matrimonial Causes Ordinance (Cap. 364), which directs that jurisdiction under the Ordinance (and consequently under the Rules) is to be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England. In my view, this entitles me to look for guidance, I put it no higher, to the practice of the High Court in England.

It seems clear that the practice in England is to order the husband to secure the wife's costs, in the absence of good reason to the contrary. It is explained, in *Rayden on Divorce* (17th Edn.), on p. 394, that

"This practice of ordering the husband to secure the wife's costs as necessities arose from the assumption (less generally applicable now than before the Married Women's Property Acts) that the wife has not sufficient separate estate to carry on, or defend, a suit against her husband".

There seems no reason to treat security for costs of a commission on any different footing from costs generally. Indeed, in *Tolstoy on Divorce* (4th Edn.), at p. 189, it is said, in relation to evidence on commission:

“The application is made and security ordered in the same manner as in the case of the wife’s application for security for her costs of the trial.”

The main reason for refusing an order for security would clearly be if it could be shown that the wife has sufficient means of her own. In the present case, the applicant has filed an affidavit that she has no income and no capital, and the truth of that affidavit has not been challenged.

The second reason for refusing an order is where the husband has been relieved of his liability for necessities by the adultery of the wife: that is not alleged in the present case.

The third consideration is the circumstances of the case generally, particularly such matters as long delay or the prosecution of a petition in a dilatory manner. Here it may be said that there has been equal delay on both sides and I do not think it is open to the respondent/petitioner to rely on delay on the part of the applicant.

I have dealt with Mr. Lockhart-Smith’s submission that English law and practice should not be applied. As regards his reliance on O. XXVI, r. 15, I accept that under r. 25 (3) of the Matrimonial Causes Rules, 1956, O. XXVI has application but I think that in the present respect r. 67 (1) of the Matrimonial Causes Rules, 1956, must prevail. As regards his argument that the applicant, having already filed a bill for taxation, is too late to apply, I think I need only mention the wording of r. 67 (1), which allows application for security “at the hearing of an application . . . for letters of request”. This is what the applicant has done, and it cannot be precluded by a prior application under r. 67 (2).

In brief, I am satisfied that I ought to order security under r. 67 (1) unless there is any good reason to the contrary and, it having been shown that the applicant has no means and no good reason to the contrary having been shown, I now order that the respondent/petitioner do furnish security for the costs of the applicant of and incidental to the examination. The amount of the security and the nature of the security are to be determined by the registrar, who in determining the amount will take into consideration such further information regarding the wife’s entitlement to legal aid as may be available when the reply to a reference to the Law Society of England, which Mr. Thornton informs me has been made, is known.

*Application allowed.*

For the applicant/respondent;

*RS Thornton*

*Fraser Murray, Thornton & Co., Dar-es-Salaam*

For the petitioner:

*Lockhart-Smith*

*WJ Lockhart-Smith, Dar-es-Salaam*

**David Joseph Nelson v East African Newspapers (NS) Ltd**  
**[1963] 1 EA 35 (CAN)**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 11 March 1963

**Case Number:** 2/1963 (P.C.)  
**Before:** Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA  
**Sourced by:** LawAfrica

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*[1] Practice – Appeal to Privy Council from Court of Appeal – Application for leave to appeal to be made to court within twenty-one days from date of judgment to be appealed from – Notice to be given to respondent of intended application – Notice of motion for leave to appeal filed in court within prescribed time and copy served on respondent – No separate notice of intended application given – Whether separate notice of intended application necessary.*

*[2] Costs – Security for costs – Appeal to Privy Council from Court of Appeal – Application for conditional leave to appeal – Appellant having previously appealed to Court of Appeal in forma pauperis – Whether court should order security for costs – Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, s. 4 (a).*

### **Editor's Summary**

The applicant was granted leave to appeal to the Court of Appeal in forma pauperis and his appeal was dismissed. The applicant then filed a notice of motion for conditional leave to appeal to the Privy Council within the prescribed time of twenty-one days and a copy of this notice was served on the respondent within that time, but no separate notice of the intended application for leave to appeal was served on the respondent. For the respondent objection was taken that the application was not competent on the ground that the respondent had not been served with a separate notice of the intended application.

### **Held –**

- (i) it is not necessary to serve a separate notice of intention to apply for leave to appeal to the Privy Council if in fact the notice of motion is filed within the prescribed time.

*Attorney-General of the Gambia v. Njie*, [1961] 2 All E.R. 504, followed.

*Hubble v. Commissioner for Transport* (1954), 19 E.A.C.A. 153 and *Kerto v. Omach*, [1959] E.A. 31 (C.A.), disapproved.

- (ii) notwithstanding that an applicant seeking leave to appeal to the Privy Council from the Court of Appeal had been permitted to appeal to that court in forma pauperis the court must nevertheless require him to give security for costs when granting conditional leave to appeal to the Privy Council.

*Husseinali Dharamsi Hasmani v. The Trustee of the Property of H. D. Hasmani* (1939), 6 E.A.C.A. 61, followed.

Conditional leave to appeal granted. Security fixed in the sum of £400 to be provided within ninety days.

### **Cases referred to in judgment:**

- (1) *Attorney-General of Gambia v. Njie*, [1961] 2 All E.R. 504.

- (2) *Hubble v. Commissioner for Transport* (1954), 19 E.A.C.A. 153.
- (3) *Kerto v. Omach*, [1959] E.A. 31 (C.A.).
- (4) *Husseinali Dharamsi Hasmani v. The Trustee of the Property of H. D. Hasmani* (1939), 6 E.A.C.A. 61.
- (5) *Fazal Kassam Velji v. M. Takim & Co.* (1955), 22 E.A.C.A. 53.

## Judgement

**Sir Ronald Sinclair P:** read the following ruling of the court:

In view of the decision of the Privy Council in *Attorney-General of the Gambia v. Njie* (1), [1961] 2 All E.R. 504, what was said by this court in *Hubble v. Commissioner for Transport* (2) (1954), 19 E.A.C.A. 153, and *Kerto v. Omach* (3), [1959] E.A. 31 (C.A.) in regard to the necessity for a separate notice of intention within the period of twenty-one days is no longer good law if, in fact, notice of motion is filed within that period. There is no substance in the objection on this procedural ground.

Having regard to the provisions of s. 4 (a) of the Kenya (Procedure in Appeals to Privy Council) Order in Council, 1962 (S.I. 1962 No. 2600) and to the decision of this court in *Husseinali Dharamsi Hasmani v. The Trustee of the Property of Husseinali Dharamsi Hasmani* (4) (1939), 6 E.A.C.A. 61, the circumstances of which are identical with the present case, we consider we have no alternative but to order security for costs as one of the conditions to be imposed. This condition need impose no injustice upon the applicant. It has been held by this court in *Fazal Kassam Velji v. M. Takim and Company* (5) (1955), 22 E.A.C.A. 53, that the period of ninety days for giving security may be extended for cogent reason. If therefore the applicant has applied with due diligence to the Privy Council for leave to appeal in forma pauperis but the period of ninety days is insufficient to enable the application to be dealt with, he can apply to this court for an extension.

Conditional leave to appeal is granted. Security is fixed at four hundred pounds (£400) to be provided within ninety days. The other periods and conditions to be as set out in practice note contained in Bulletin No. 11 of November, 1954.

*Conditional leave to appeal granted. Security fixed in the sum of £400 to be provided within ninety days.*

The applicant in person.

For the respondent:

*Sir William O'Brien Lindsay*

*Hamilton, Harrison & Mathews, Nairobi*

## **Musa Kakade v R** [1963] 1 EA 36 (CAK)

|                          |  |
|--------------------------|--|
| <b>Division:</b>         | Court of Appeal at Kampala                                     |
| <b>Date of judgment:</b> | 19 March 1963  |
| <b>Case Number:</b>      | 152/1962   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and New bold JA |
| <b>Sourced by:</b>       | LawAfrica  |

**Appeal from:** High Court of Uganda – Slade, J

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*[1] Criminal law – Causing death by rash or negligent act not amounting to manslaughter – Death caused while driving a motor vehicle – Degree of negligence required – Driver disqualified from holding or obtaining driving permit – Penal Code (Cap. 22), s. 219 A (U.) – Traffic Ordinance, 1951, s. 60 (1) (U.).*

### **Editor's Summary**

The appellant was a driver of a motor vehicle which was involved in an accident and as a result of which a person was killed. The appellant was convicted under s. 219 A of the Penal Code of causing death by rash or negligent act not amounting to manslaughter. On appeal the grounds of appeal were that the degree of negligence required was a high one and that it had not been established, and that the court had no jurisdiction to impose a disqualification from holding or obtaining a driving permit for a period of three years under

s. 60 (1) (a) of the Traffic Ordinance, 1951. It was submitted that “any offence” in s. 60 (1) should be construed as referring only to offences under the Traffic Ordinance.

**Held –**

- (i) the degree of negligence required to establish a charge under s. 219 A of the Penal Code is higher than that required to establish liability in a civil case but less than that required to establish a charge of manslaughter and there was evidence which was sufficient to establish the charge under s. 219 A.
- (ii) the words “any offence in connection with the driving of a motor vehicle” in s. 60 (1) (a) of the Traffic Ordinance, 1951, are not restricted to offences under that Ordinance only, and accordingly the trial court had jurisdiction to impose a disqualification under s. 60 (1) (a).

Appeal dismissed.

### **Judgement**

**Sir Ronald Sinclair P:** read the following judgment of the court:

There are three grounds of appeal against conviction. The first is, in effect, that the degree of negligence required was a high one and that it had not been established. The degree of negligence required to establish a charge under s. 219 A of the Penal Code is higher than that required to establish liability in a civil case but less than that required to establish a charge of manslaughter. The courts below did not misdirect themselves on this question. There was evidence which, being believed, was sufficient to establish the charge.

The second ground, as argued, was that the Crown should have adduced some evidence to rebut the defence of a mechanical defect in the steering once it had been raised. The only evidence of any defect in the steering was just a bald statement by the appellant that the steering failed. The magistrate disbelieved him and there are no grounds in law for upsetting that finding. Once his evidence was disbelieved, there was no evidence of a mechanical defect in the steering.

The last ground of appeal is that the trial court had no jurisdiction to impose a disqualification under s. 60 (1) of the Traffic Ordinance, 1951 (No. 34 of 1951). It was submitted that the words “any offence” should be construed as “any offence under this Ordinance”. We do not accept this submission. In our view the words “any offence in connection with the driving of a motor vehicle” were used deliberately so as not to restrict the power to offences under the Ordinance.

The appeal is dismissed.

*Appeal dismissed.*

For the appellant:

*SH Dalal*

*Haque, Dalal & Singh, Kampala*

For the respondent:

*JM Long* (Crown Counsel, Uganda)



**Waithaka s/o Kabera v R**  
**[1963] 1 EA 38 (SCK)**

**Division:** HM Supreme Court of Kenya at Nairobi  
**Date of judgment:** 19 November 1962  
**Case Number:** 941/1962  
**Before:** Rudd Ag CJ and Goudie J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Plea – Recording of – Use of word “guilty” in recording plea – Necessity for record to show that accused spoke in English.*

**Editor’s Summary**

The appellant, an African, was charged of moving stock without a permit contrary to the Animal Diseases Rules made under the Animal Diseases Ordinance and the plea recorded by the trial magistrate was “I plead guilty”. The appellant was convicted. On appeal,

**Held** – the word “guilty” should not be used in recording a plea unless it is actually used by the accused in which case the record should show that the accused spoke in English.

Appeal allowed. Conviction, fine and order for confiscation set aside, and new trial ordered.

**Case referred to:**

(1) *Byarufu s/o Gafa v. R.* (1950), 17 E.A.C.A. 125.

**Judgment**

**Rudd Ag CJ:** This appeal must be allowed. The conviction, fine and order for confiscation are set aside and a new trial is ordered.

The accused is an African and the plea is recorded as follows: “I plead guilty”. The word “guilty” should not be used in recording a plea unless it is actually used by the accused in which case the record should show that the appellant spoke in English.

We would refer to the views stated by the Court of Appeal in *Byarufu s/o Gafa v. R.* (1) (1950), 17 E.A.C.A. 125, with which we respectfully agree.

We note with some dissatisfaction the fact that the appellant does not appear to have been afforded an opportunity to make a statement in mitigation nor is there any statement of the alleged circumstances other than the particulars of the charge.

*Appeal allowed. Conviction, fine and order for confiscation set aside, and new trial ordered.*

For the appellant:

*Swaraj Singh*

*Swaraj Singh, Nairobi*

For the respondent:

*GA Twelftree (Ag. Senior Crown Counsel, Kenya)*

*The Attorney-General, Kenya*

**Attorney-General v Bugisu Coffee Marketing Association Ltd**  
**[1963] 1 EA 39 (HCU)**

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 6 March 1963                    |
| <b>Case Number:</b>      | 629/1962                        |
| <b>Before:</b>           | Slade J                         |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Revenue – Export duty – Assessment – Coffee – Export duty payable on arabica coffee if value exceeds shs. 3,900/- per ton – Arabica coffee exported to Kenya – Value not exceeding shs. 3,900/- per ton when exported – Arabica coffee processed and cleaned in Kenya – Processed coffee sold in Kenya at price exceeding shs. 3,900/- per ton – Value of arabica coffee for purpose of determining incidence of export duty – Whether coffee should be valued with or without regard to processing – Basis of calculating export duty – Whether export duty payable – Coffee (Export Duty) Ordinance, 1960, s. 2, s. 3, s. 4 (4) (U.) – Bugisu Coffee Ordinance, 1962, s. 15 (2) (U.) – Coffee (Export Duty) (Amendment) Ordinance, 1962 (U.).*

**Editor's Summary**

Under the Coffee (Export Duty) Ordinance, 1962, export duty is payable on arabica coffee exported from Uganda where the value of such coffee exceeds Shs. 3,900/- per ton and Part B of the Second Schedule of the Ordinance further provides that the value of such coffee for the purpose of assessing export duty shall be either the actual price obtained for each ton of coffee f.o.r. Kilindini or, if the coffee is not sold f.o.r. Kilindini, such price as the Secretary of the Treasury is satisfied would have been its price if it had been sold f.o.r. Kilindini. The defendants exported a quantity of arabica coffee to Kenya the value of which did not exceed Shs. 3,900/- per ton. The coffee was processed and cleaned in Kenya and the clean coffee was sold at Nairobi at a price exceeding Shs. 3,900/- per ton. The Secretary to the Treasury, in purported exercise of his power under Part B of the Second Schedule to the Ordinance, calculated the value of the coffee on the basis of the price realised by the sale of the processed coffee adjusted to a price f.o.r. Kilindini and sued the defendants for the amount of the export duty payable. For the defendants its

was submitted that duty was assessable on the value of the type and grade of coffee which was exported and not on the value of the product of that coffee after processing in Kenya.

**Held** – section 3 of the Coffee (Export Duty) Ordinance did not entitle the Secretary to the Treasury to assess duty on the value of the processed coffee produced in Kenya from arabica coffee exported from Uganda by reference to the price of such processed coffee f.o.r. Kilindini; the calculation should have been made on the basis of the price, f.o.r. Kilindini, of arabica coffee, since it was arabica coffee and not processed coffee which was exported from Uganda.

Suit dismissed.

**Case referred to:**

(1) *Canadian Eagle Oil Co. Ltd. v. R.*, [1946] A.C. 119; [1945] 2 All E.R. 499.

**Judgement**

**Slade J:** The plaintiff sues the defendants for the sum of Shs. 221,832/19 in respect of export duty claimed to be payable by the defendants by virtue of the provisions of the Coffee (Export Duty) Ordinance, 1960

(hereinafter for convenience referred to as “the Ordinance”) in respect of certain coffee exported by it.

At an earlier stage in these proceedings, I was asked to consider two issues raised in the written statement of defence, it being then conceded that if I found in the defendants’ favour on those issues, the plaintiff’s case must fail. In the event, for reasons which I expressed at the time and which it is not necessary now to repeat, I found in the plaintiff’s favour on those two issues and the hearing continued on the sole issue which counsel agreed remained to be answered.

That issue is as follows:

“Is the plaintiff entitled to claim export duty on clean coffee sold by the defendants at Nairobi at a price exceeding Shs. 3,900/- per ton which said coffee was the processed products of parchment coffee of a value not exceeding Shs. 3,900/- per ton before export from Uganda?”

It is agreed if I find in favour of the plaintiff on this issue, then the amount claimed in the plaint is the amount of coffee export duty payable by the defendants to the plaintiff.

The admitted facts are as follows:

- (1) During the months of April, May, June and July, 1962, the defendants exported from Uganda a total quantity of 444.744 tons of parchment arabica coffee.
- (2) That the value of such parchment coffee did not exceed Shs. 3,900/- per ton.
- (3) That under the Coffee (Export Duty) Ordinance, 1960, no duty is payable when the value of arabica coffee does not exceed Shs. 3,900/- per ton.
- (4) That after export from Uganda the defendants caused the aforesaid parchment coffee to be processed and cleaned at Nairobi.
- (5) That 444.744 tons of parchment coffee processed at Nairobi yielded 365.896 tons of clean coffee.
- (6) The defendants sold at Nairobi the aforesaid quantity of 365.896 tons of clean coffee at a price exceeding Shs. 3,900/- per ton.

In addition, the parties are agreed that the defendants, being licensed under the provisions of s. 15 (2) of the Bugisu Coffee Ordinance, 1962, are subject to the provisions of s. 4 of the Ordinance as amended by the Coffee (Export Duty) (Amendment) Ordinance, 1962.

Export duty is payable on exported coffee by virtue of the provisions of s. 3 of the Ordinance, which, following the amendment made by the Existing Laws Adaptation Order, 1962 (Legal Notice No. 261/62), is in the following terms:

- “3.(1) Export duty shall be payable on all coffee exported from Uganda at the rates shown in the First Schedule to this Ordinance.
- (2) The value of coffee for the purposes of the First Schedule to this Ordinance shall be calculated in the manner provided in the Second Schedule thereto.”

In view of the fact that the coffee admitted to be exported by the defendants was arabica coffee, it is clear from the terms of the First Schedule to the Ordinance that export duty is not payable unless the value of such coffee exceeds Shs. 3,900/- per ton. If such value exceeds Shs. 3,900/- per ton, the duty payable is one-third of the amount of such excess. Part B of the Second Schedule to the Ordinance prescribes the method of calculating the value of arabica coffee for the purpose of assessing the amount of export duty payable on the export of such coffee and is in the following terms:

“Part B – Arabica Coffee

“The value of arabica coffee for the purposes of the First Schedule to this Ordinance shall be the actual price obtained for each ton of coffee f.o.r. Kilindini or if the coffee is not sold f.o.r. Kilindini such price as the Secretary to the Treasury is satisfied would have been its price if it had been sold f.o.r. Kilindini.”

The exported coffee was not sold “f.o.r. Kilindini” and accordingly its value for the purpose of assessing duty was

“such price as the Secretary to the Treasury is satisfied would have been its price if it had been sold f.o.r. Kilindini”.

As is to be seen from the facts admitted for the purposes of this suit, the coffee exported by the defendants during the months of April, May, June and July, 1962, totalled 444.744 tons of arabica parchment coffee. That coffee was not sold in that form, but after export was processed in Kenya at the instance of the defendants and yielded 365.896 tons of clean coffee. That clean coffee was sold in Kenya at a price in excess of Shs. 3,900/- per ton, and it is common ground that the Secretary to the Treasury, in purported exercise of his powers under Part B of the Second Schedule to the Ordinance, calculated the value of the coffee on the basis of the price realised by the sale of that clean coffee adjusted to a price “f.o.r. Kilindini” by the addition of the appropriate amount of freight from the place of sale to Kilindini.

It is argued by the plaintiff that for the purpose of assessing export duty, the value of the coffee as exported is of no consequence; its value is the actual price received when the coffee is sold, irrespective of the fact that the exported coffee has been the subject of processing into coffee which attracts a higher price per ton. Learned Crown counsel, Mr. Hebron, relied to some extent on s. 4(4) of the Ordinance to support his submission in this respect.

Mr. Dholakia, for the defendants, argued that duty is assessable on the value of the type and grade of coffee which is exported and not on the value of the product of that coffee after processing. In support of his submissions, he relied on the definition of coffee contained in s. 2 of the Ordinance, which is in the following terms:

“2. . . . .

‘coffee’ means the beans or berries, or parts thereof, of all species of coffee and includes clean coffee, parchment coffee, lights, rough-hulled coffee, and coffee in the cherry but does not include triage; . . . .”

He went on to argue that in interpreting the various references to “coffee” throughout the relevant sections of the Ordinance, and in the Schedules, one must have regard only to the type and grade of coffee which was exported.

The Ordinance is a taxing Act and one must look at the language used to ascertain the nature of the obligation created. In *Canadian Eagle Oil Co. Ltd. v. R.* (1), [1946] A.C. 119 at p. 140, Viscount Simon, L.C., adopted with approval a passage from an earlier judgment of Rowlatt, J., in the following terms:

“in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

Looking fairly at the language used in the Ordinance, it is my opinion that s. 3 of the Ordinance imposes an export duty on the type and grade of coffee which is exported from Uganda, the value of that type and grade of coffee being

ascertained in accordance with the Second Schedule to the Ordinance and the duty being assessed on that value in accordance with the First Schedule. If, as in this case, parchment coffee is exported, then in my view the relevant parts of Part B of the Second Schedule must be construed as if it read –

“The value of arabica parchment coffee for the purposes of the First Schedule . . . shall be . . . such price as the Secretary to the Treasury is satisfied would have been its price if it (i.e. the parchment coffee) had been sold f.o.r. Kilindini.”

It follows, in my opinion, that the Secretary to the Treasury was not entitled to assess duty on the value of the clean coffee produced from the parchment coffee exported adjusted to the price of that clean coffee f.o.r. Kilindini; in my view the calculation should have been made on the basis of the price, f.o.r. Kilindini, of parchment coffee, since it was parchment coffee and not clean coffee which was exported from Uganda.

I answer the issue framed in the negative.

In the result, the plaintiff’s claim is dismissed.

I reserve the question of costs for subsequent argument.

*Suit dismissed.*

For the plaintiff:

*H Hebron* (Crown Counsel, Uganda)

*The Attorney-General*, Uganda

For the defendants:

*BD Dholakia*

*BD Dholakia*, Kampala

## **Abdallah s/o Hamisi v Republic** [1963] 1 EA 42 (HCT)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 30 January 1963                           |
| <b>Case Number:</b>      | 19/1963                                   |
| <b>Before:</b>           | Biron J                                   |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Criminal law – Sentence – Causing obstruction or disturbance in course of judicial proceedings – Sentence greater than maximum prescribed by law – Penal Code (Cap. 24), s. 121 (K.) – Penal Code (Cap. 16), s. 114 (1) (c) and (2) (T).*

**Editor's Summary**

The appellant was convicted of cattle stealing and also of causing obstruction or disturbance in the course of a judicial proceeding under s. 114 (1) (c) of the Penal Code. The magistrate sentenced the appellant to two years' imprisonment for cattle stealing and three months for the offence under s. 114 (1) (c), for which the maximum sentence prescribed by s. 114 (2) is a fine of Shs. 400/- or in default of payment one months' imprisonment. On appeal,

**Held –**

- (i) the sentence imposed by the court in respect of the offence under s. 114 (1) (c) of the Penal Code was ultra vires and should accordingly be set aside.

Appeal dismissed in respect of the charge of cattle stealing. Sentence set aside in respect of conviction under s. 114 (1) (c).

**Case referred to:**

- (1) *Joseph Odhengo s/o Ogongo v. R.* (1954), 21 E.A.C.A. 302.

## Judgement

**Biron J:** The appellant was convicted of cattle stealing and he was sentenced to imprisonment for two years. He is now appealing.

.....

After the appellant had been sentenced he apparently refused to leave the dock and created a disturbance in court. The magistrate very properly, as directed by the Court of Appeal in *Joseph Odhengo s/o Ogongo v. R.* (1) (1954), 21 E.A.C.A. 302, a case based on the then s. 116, now s. 121 of the Kenya Penal Code, which, however, except for the sentences being greater, corresponds to s. 114 of our Code, framed a charge and called upon the appellant to show cause why he should not be convicted. The charge as so framed reads:

“Abdallah Hamisi is charged with creating a disturbance in the court at Iringa on December 20, 1962, at 9 a.m. by failing to leave the court when instructed to do and struggling with the constable guarding him.”

The record then continues:

“Accused states: ‘I wanted to ask to take my things.’

“I sentence Abdallah Hamisi to three months’ imprisonment. Rights of appeal explained.”

By s. 114 (1) (c) of the Penal Code, under which the charge was laid:

“Any person who

.....

(c) causes an obstruction or disturbance in the course of a judicial proceeding:

.....

is guilty of a misdemeanour, and is liable to imprisonment for six months or to a fine not exceeding Shs. 500/-.”

Sub-section (2) reads:

“When any offence against paras. (a), (b), (c), (d) or (i) of sub-s. (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day take cognisance of the offence and sentence the offender to a fine of Shs. 400/- or in default of payment to imprisonment for one month.”

It is apparent from the record that the magistrate acted under sub-s. (2), as the appellant was not convicted of contempt either after a trial or on his own plea – his statement is certainly not a plea of guilty – but in accordance with the procedure provided for in sub-s. (2), the magistrate having taken cognisance of the offence committed in front of him. Where an offender is so convicted and sentenced for contempt the maximum sentence which can be imposed is, as expressly stated, a fine of Shs. 400/- or in default imprisonment for one month. The sentence imposed by the court was ultra vires and is accordingly set aside.

In view of the long term of imprisonment to which the appellant has been sentenced, I do not consider it either necessary or desirable to impose a fine for the contempt of court. The Director of Public Prosecutions is in agreement with such course.

To the limited extent indicated, the appeal is allowed.



The sentence of imprisonment on the charge of cattle theft is hereby confirmed.

*Appeal dismissed in respect of the charge of cattle stealing. Sentence set aside in respect of conviction under s. 14 (1) (c).*

The appellant did not appear and was not represented.

For the respondent:

*AM Troup* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

## **George Anthony Wood v R** [1963] 1 EA 44 (CAN)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Nairobi  |
| <b>Date of judgment:</b> | 4 March 1963  |
| <b>Case Number:</b>      | 174/1962  |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P, Crawshaw and Newbold JJA and Mayers J |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | H.M. Supreme Court of Kenya – Rudd, Ag. C.J   |

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*[1] Criminal law – Theft by a servant – Fraudulent conversion – Trial – Jury – Direction to jury – Jury directed that there was conversion – Question left to jury – Whether conversion fraudulent – Misdirection.*

### **Editor's Summary**

The appellant was secretary of a club and, being expected to do a certain amount of entertaining in connection with his work, was entitled to obtain drink from the bar at a discount of 25%. In addition, however, the appellant took from the club stocks whole bottles of whisky and brandy and entries in relation to these bottles were not made in the bar book, but according to the appellant he signed chits for them. By January 17, 1962, the appellant owed the club 48 bottles of whisky and 12 bottles of brandy which he had thus taken at their cost. On that date the appellant, being aware that a check would soon be made on the club's stocks of liquor, ordered in the club's name and on the club's credit account 48 bottles of whisky and 12 bottles of brandy from two dealers. The appellant took delivery of the whisky and brandy bottles and put them in the club's stocks and at the same time destroyed the chits which he had given. The appellant was later charged and convicted on three counts of false accounting and on two counts of theft from the club of 48 bottles of whisky and 12 bottles of brandy. The Acting Chief Justice directed the jury that when the appellant ordered the 48 bottles of whisky and 12 bottles of brandy on the club's account it became the property of the club and the appellant converted it to his own use when he put the bottles in the club's store as his own. The only question left to the jury was whether the

conversion was fraudulent or not. The appeal against three counts of false accounting was dismissed but the appeal against two counts of theft was stood over for further argument before a bench of five judges.

**Held –**

- (i) the evidence was not sufficiently strong inevitably to lead to the conclusion that there was intervening conversion between the taking of the delivery of the whisky and brandy and the putting of it in the club's stocks and accordingly the question whether there was conversion or not should have been left with the jury.
- (ii) the Acting Chief Justice was wrong in the circumstances of the case to direct the jury that there had been a conversion and that the only question was whether it was fraudulent or not.

Convictions on two counts of theft quashed and sentences imposed thereon set aside.

**Case referred to:**

- (1) *R. v. Gale* (1876), 2 Q.B.D. 141.

## Judgement

**Crawshaw JA:** read the following judgment of the court:

The appellant was tried before the Acting Chief Justice and a jury on a number of counts, and was convicted and sentenced on two counts of theft by a servant (counts 5 and 7), and on three counts of false accounting (counts 2, 3 and 4). On counts 5 and 7 he was sentenced to six months' imprisonment the sentences to run concurrently, but consecutively with the sentences on the other counts. He appealed to this court against all the convictions. The appeal was dismissed as to counts 2, 3 and 4, but as regards counts 5 and 7 it was stood over for further argument before a bench of five judges.

The appellant at the relevant times was secretary of the Karen Country Club and, being expected to do a certain amount of entertaining, was entitled to obtain drink from the bar at a discount of 25%. When he ordered drink the amount was entered in a book called the secretary's bar book. In addition, however, the appellant took from the club stocks whole bottles of whisky and brandy. Entries in relation to these whole bottles were not made in the bar book, but according to the appellant, he signed chits for them. By January 17, 1962, the appellant owed to the club 48 bottles of whisky and 12 bottles of brandy which he had thus taken, or their cost. On that date, when he was aware that a check would soon be made of the club's stocks of liquor, as the club intended in February to commence a "cellar account" with Saccone and Speed Ltd., he ordered in the club's name and on the club's credit account 48 bottles of whisky at a cost of Shs. 1,680/- from Smith Mackenzie & Co. Ltd., and 12 bottles of brandy at a cost of Shs. 479/- from Jardin Ltd. He took delivery of this whisky and brandy and put it in the club's stocks at the same time destroying the chits which he had given for the 48 bottles of whisky and 12 bottles of brandy taken from stock. In count 5 the appellant was charged with stealing from the club 48 bottles of whisky bought from Smith Mackenzie & Co. Ltd. and in count 7 he was charged with stealing from the club the 12 bottles of brandy bought from Jardin Ltd.

The appellant did not pay for that whisky and brandy and it seems that the official of the club had no knowledge of the transaction until May 6, 1962 (the appellant's services having been terminated at the end of April) when he wrote to the then secretary of the club informing him that Smith Mackenzie & Co. Ltd.'s account for Shs. 1,680/- and Jardin Ltd.'s account for Shs. 479/- were his personal accounts.

Mr. Gledhill, who appeared for the appellant, submitted there were two possibilities, on either of which the appellant was entitled to succeed; they were as we understood him:

- (a) That the new liquor was ordered in the name of and for the club; that delivery was taken by the club, the liquor being placed in the club's store for the use of members and the profit of the club; and that it always belonged to the club and that therefore there was no conversion; that the fact that this transaction concealed and may have been intended to conceal the earlier withdrawal of liquor by the appellant was immaterial for the purposes of the charges in counts 5 and 7, as the charges did not relate to the earlier liquor or to the destruction of the chits.
- (b) That the appellant in fact ordered the new liquor for himself through the club in order to replace the earlier liquor and that the club never had any property in the liquor sufficient to support a charge of conversion, but became owner of the liquor only after it had been placed in the club's store by the appellant who up to then had been the owner of it.

In support of (b) Mr. Gledhill referred to the evidence of Mr. Epson, general manager of Jardin Ltd., and a witness for the prosecution, who said in cross-

examination that it was “perfectly usual” for a club’s secretary to buy goods through the club in order to obtain wholesale prices; Mr. Gledhill submitted that the appellant became the owner at the time of purchase.

Mr. Twelftree, for the Crown, submitted that as the new liquor was ordered on behalf of the club and on the club’s account by the secretary of the club who had authority to buy for the club, it was at the time of purchase and immediate delivery by him to the club, converted it to his own use in that he intended the delivery to be in his own name, and that on delivery it again became the property of the club. He referred to *R. v. Gale* (1) (1876), 2 Q.B.D. 141. That case has certain features similar to the instant case, and the jury found the prisoner guilty. There, however, the question on appeal was whether there was evidence of embezzlement which had justifiably been left to the jury, whereas the question in the instant case is the converse, for the appellant does not complain of what was left to the jury but of what was not left to the jury. In the instant case the Acting Chief Justice directed the jury that when the appellant ordered the new liquor on the club’s account it became the property of the club and the appellant converted it to his own use when he put it in the club’s store as his own. What he did leave to the jury was whether the conversion was fraudulent, or whether the appellant genuinely thought (even though mistakenly) that by virtue of his relationship with the club it was legal for him to obtain the liquor in the way he did with the intention of paying for it, in which case he would not have been guilty of theft by conversion.

In his evidence the appellant said he had ordered the new liquor to replace what he had previously taken and “to square up the chits”; the position he said was then the same as before. This was not, strictly speaking, correct, as he did not replace the old chits by new ones. At one stage he said, “I think I paid Smith Mackenzie”, but later he said the liquor had been paid for by the club and he had not paid the club because the club had not paid him (he may here have been referring to salary in lieu of notice). When asked in cross-examination whether he agreed that on January 17, 1962, he owed the club forty-eight bottles of whisky he replied “Either to the club or Smith Mackenzie”.

The matter which has troubled us (and being unable to come to an unanimous decision this judgment will be signed by a majority only of the bench) is whether the Acting Chief Justice properly directed the jury on the counts with which we are now concerned. If, of course, it could be said (as Mr. Gledhill submits) that the appellant was buying on his own behalf and obtained legal ownership of the liquor, then there could have been no conversion, and the issue of whether the appellant was in fact buying on his own behalf was not left to the jury. Supposing, however, that the Acting Chief Justice was correct in directing the jury that the legal ownership of the liquor was in the club at the time of the purchase, was he entitled to withdraw from the jury the question whether there was a conversion? It is to be observed that it was not necessary for the appellant to have converted the liquor in order to achieve his object. His intention was to replace the earlier liquor which he had taken, and as he had authority to buy liquor for the club he could do this on the club’s account, which is precisely what he did do. We do not think that the evidence is sufficiently strong to lead inevitably to the conclusion that there was an intervening conversion, and we think that this should have been left to the jury. If the property in the new liquor was in the club throughout and conversion was not found, the appellant would not have been guilty of the offences charged in relation thereto; it is possible that in those circumstances he might have been charged with the theft of the chits, and that his purpose was to destroy the evidence of his earlier withdrawals of liquor, but it is not necessary for us to consider that. We are of the opinion that on the failure to leave to the jury the question of conversion,

the only proper course to adopt is to quash the convictions on counts 5 and 7; this we do and set aside the sentences imposed on those counts.

*Convictions on two counts of theft quashed and sentence imposed thereon set aside.*

For the appellant:

*J Gledhill and Sheikh Waheed*

*B Sirley & Co., Nairobi*

For the respondent:

*GA Twelftree* (Senior Acting Crown Counsel, Kenya)

*The Attorney-General, Kenya*

**John Rothblum v Ebrahim Hajee Limited**  
[1963] 1 EA 47 (CAD)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Dar-Es-Salaam                              |
| <b>Date of judgment:</b> | 21 March 1963   |
| <b>Case Number:</b>      | 57/1962   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | High Court of Tanganyika – Williams, J                        |

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[1] *Jurisdiction – Revision – Civil action in district court – Judgment entered ex parte and decree issued – Extension of time given to file application to set aside decree – Decree set aside – Order of district court setting aside decree set aside by High Court in its revisional jurisdiction – Power of High Court to revise interlocutory order of district court – Whether application to set aside decree and order made thereon constitute a “case which has been decided” – Subordinate Courts (Civil Procedure-Summonses and Pleadings) Rules, 1955, r. 7 (b), r. 17 and r. 23 (1) (T.) – Indian Code of Civil Procedure, 1908, s. 115 – Subordinate Courts Ordinance (Cap. 3), s. 10 (T.) – Indian Civil Procedure Rules, O. IX, r. 13 – Indian Limitation Act, 1908, First Schedule, art. 164.*

[2] *Jurisdiction – Civil action in district court – Judgment entered ex parte and decree issued – Extension of time given to file application to set aside decree – Decree set aside – Whether district court has power to extend time for filing such application – Subordinate Courts (Civil Procedure-Summonses and Pleadings) Rules, 1955, r. 7 (b), r. 17 and r. 23 (1) (T.) – Indian Limitation Act, 1908, First Schedule, art. 164.*

### **Editor's Summary**

The respondent filed an action in the district court against the appellant claiming the balance of the price of goods sold and delivered and obtained an *ex parte* judgment on May 6, 1960, in respect of which a decree was issued. The appellant then applied on February 18, 1961, for extension of time under r. 23 (1) of the Subordinate Courts (Civil Procedure-Summonses and Pleadings) Rules, 1955, within which to file an application to set aside the decree and at the same time applied to have the decree set aside under r. 17. The district court granted the application for extension of time and set aside the decree. The respondent thereupon applied to the High Court under s. 115 of the Indian Code of Civil Procedure and s. 10 of the Subordinate Courts Ordinance for revision of the order of the district court granting extension of time to file the application for setting aside the decree and the order setting aside the decree. The High Court held that r. 23 (1) had no application in the circumstances and set aside the two orders of the district court, thus restoring the *ex parte*

decree of in favour of the respondent. On appeal to Court of Appeal it was submitted, *inter alia*, for the appellant that the order setting aside the *ex parte* decree was an interlocutory order, that an interlocutory application and an order thereon is not a “case which has been decided” within the meaning of s. 115 and that, accordingly, the High Court had no jurisdiction to revise the order under that section.

**Held –**

- (i) the application for setting aside the *ex parte* decree was a separate and distinct proceeding from the suit which had been decided and constituted a “case” and the order made thereon the “decision of a case” within the meaning of s. 115 of the Indian Code of Civil Procedure.”
- (ii) s. 23 (1) of the Subordinate Courts (Civil Procedure-Summonses and Pleadings) Rules, 1955, had no application with regard to extending the time for filing the application to set aside *ex parte* decree as the decree had already been issued and the question of extending time was governed by art. 164 of the First Schedule to the Indian Limitation Act, 1908.
- (iii) there was no power under the Indian Limitation Act to extend the time for making the application to set aside the *ex parte* decree and the district court, in granting an extension of time to file the application to set aside the *ex parte* decree, had acted without jurisdiction and the provisions of para. (a) of s. 115 applied.
- (iv) the High Court had jurisdiction to revise the order of the district court setting aside the *ex parte* decree.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Vithaldas Jetha v. Valibai* (1935), 1 T.L.R. (R.) 400.
- (2) *Lal Chand v. Behari Lal* (1924), A.I.R. Lah. 425.
- (3) *Hooda Ltd. v. Rajwani*, Tanganyika High Court Civil Revision No. 4 of 1957 (unreported).
- (4) *Hassam Karim & Co. Ltd. v. Africa Import and Export Central Corporation Ltd.*, [1960] E.A. 396 (T.).
- (5) *Keshavji Jethabhai & Bros. Ltd. v. Mohanlal Kurji*, Tanganyika Gazette L.R.S. 4 of 1962 at p. 48.
- (6) *Hassam Karim & Co. Ltd. v. Africa Import Export Corporation Ltd.*, Tanganyika High Court Civil Revision No. 1 of 1962 (unreported).
- (7) *Muhinga Mukoni v. Rushwa Native Farmers Co-operative Society Ltd.*, [1959] E.A. 595 (T.).
- (8) *Khan Stores v. A.J. Delawer*, [1959] E.A. 714 (T.).
- (9) *Gurdevi v. Bakhish* (1943), A.I.R. Lah. 65.
- (10) *Ram Sarup v. Gaya Prasad* (1926), 48 All. 175.
- (11) *Ramanathan Chettyar v. Baldeo Singh* (1933), A.I.R. Rang. 110.
- (12) *Firm Bhajan Ram-Gil Raj Mal v. Mt. Narain Devi* (1926), A.I.R. Lah. 642.
- (13) *Piroj Shah v. Qarib Shah* (1926), A.I.R. Lah. 379.

(14) *Wiru Ram v. Amer Chand* (1926), A.I.R. Lah. 344.

(15) *Zenab d/o Sukhio v. Mohamed Haji Allahdino* (1938), A.I.R. Sind. 76.

March 21. The following judgments were read:

### **Judgment**

**Sir Ronald Sinclair P:** This is an appeal from an order made by the High Court of Tanganyika in the exercise of its revisional jurisdiction restoring an *ex parte* decree passed by the Tanga district court which had been set aside by the district court on an application under r. 17 of the Subordinate



Courts (Civil Procedure-Summonses and Pleadings) Rules, 1955, hereinafter referred to as “the 1955 Rules”.

For a proper understanding of the appeal it is desirable to set out briefly the history of this unfortunate litigation. On March 7, 1960, the respondent filed a plaint in the Tanga district court claiming from the appellant the sum of Shs. 1,597/96 being the balance of account due for wines, spirits, groceries and sundry goods sold and delivered by the respondent to the appellant.

On May 6, 1960, the date fixed by the summons for the hearing of the suit, the appellant did not appear and an *ex parte* judgment was entered against him under the provisions of r. 7 (b) of the 1955 Rules. According to the affidavit sworn by the process server, the summons was served by affixing a copy thereof to the front door of the appellant’s house. There was nothing in the affidavit to indicate where the house was situated. A decree was issued on May 20, 1960.

On January 21, 1961, the appellant filed an application for review of the *ex parte* judgment in the Tanga district court. In an affidavit in support of the application, the appellant swore that he was not indebted to the respondent in any sum and had never had any dealings with him, that he did not see the summons which the process server said he had affixed to his house and that the first knowledge he had of the proceedings was on or about July 23, 1960, when he received a letter from the respondent’s advocates dated July 7, 1960, informing him that the decree in the suit had been transferred to Dar-es-Salaam for execution and that unless the amount due was paid within four days the decree would be executed. He handed the letter forthwith to his advocates for action. That proof of service was, at the least, unsatisfactory appears from a later affidavit of the process server who then swore that he affixed the summons, not to the appellant’s house, but to the front door of the office of the Coastal Timber Company Limited where the appellant was said to be working. The application for review was dismissed on February 8, 1961, on the ground that it was misconceived, the magistrate holding that the proper course to take was to apply to have the decree set aside under r. 17 of the 1955 Rules.

On February 18, 1961, the appellant applied to the Tanga district court for an extension of time within which to file an application to set aside the *ex parte* decree and at the same time applied to have the decree set aside. The district court on April 8, 1961, granted the application for extension of time and on May 17, 1961, set aside the decree and ordered the filing of a written statement of defence.

On July 31, 1961, the respondent filed in the High Court an application for revision of the order of the district court dated April 8, 1961, extending the time to file the application to set aside the *ex parte* decree and the order dated May 17, 1961, setting aside the decree. On February 14, 1962, the High Court allowed the application and set aside the two orders of the district court, thus restoring the *ex parte* decree in favour of the respondent.

Notice of intention to appeal against the decision of the High Court was filed on February 28, and on March 14 an application for leave to appeal was filed. This application was dismissed by the High Court on April 12, 1962, on the ground that it was out of time.

A further application for leave to appeal together with an application to extend the time for lodging the appeal was filed on May 21. On June 8, 1962, the High Court granted leave to appeal out of time. The respondent appealed to this court against that decision and on February 18, 1963, this court dismissed the appeal subject to a variation to which it is unnecessary to refer.

The first question for decision in this appeal is whether the High Court had jurisdiction to revise the

order of the district court setting aside the *ex parte* decree. The application to the High Court for revision was made under s. 115

of the Indian Code of Civil Procedure and s. 10 of the Subordinate Courts Ordinance (Cap. 3). The learned judge appears to have acted under s. 115. That section provides:

“The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears:

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.”

Mr. Sayani for the appellant submitted that the order setting aside the *ex parte* decree was an interlocutory order, that an interlocutory application and order thereon is not a “case decided” within the meaning of s. 115 and that, accordingly, the High Court had no jurisdiction to revise the order under that section. In support of his submission that an interlocutory order cannot be the subject of revision Mr. Sayani referred us to a very large number of authorities.

There is a conflict of judicial opinion both in the High Court of Tanganyika and in the various High Courts of India as to the meaning of the words “any case which has been decided” in s. 115. Some courts in India take the view that an interlocutory order which does not decide the suit itself is not a “case decided” and cannot be interfered with under the section, while others take the view that all interlocutory orders deciding any substantial question in controversy between the parties affecting their rights, as distinguished from purely formal or incidental orders, are revisable even though passed in the course of the trial of the suit.

In Tanganyika so long ago as 1935 it was held by Bates, J., in *Vithaldas Jetha v. Valibai* (1) (1935), 1 T.L.R. (R.) 400 that the High Court had no jurisdiction under s. 115 to revise interlocutory orders. He adopted the reasoning in *Lal Chand v. Bahari Lal* (2) (1924) A.I.R. Lah. 425, where the former the two views I have set out above was followed. That decision has been followed by Mahon, J., as he then was, in *Hooda Ltd. v. Rajwani* (3), Tanganyika High Court Civil Revision No. 4 of 1957 (unreported), by Simmonds, J., in *Hassam Karim & Co. Ltd. v. Africa Import and Export Central Corporation Ltd.* (4) [1960] E.A. 396 (T.), and in *Keshavji Jethabhai and Bros. Ltd. v. Mohanlal Kurji* (5), Tanganyika Gazette L.R.S. 4 of 1962 at p. 48, and by Spry, J., in *Hasham Karim & Co. Ltd. v. Africa Import Export Corporation Ltd.* (6), Tanganyika High Court Civil Revision No. 1 of 1962 (unreported).

The opposite view was taken by Davies, C.J., in *Muhinga Mukoni v. Rushwa Native Farmers Co-operative Society Ltd.* (7), [1959] E.A. 595 (T.), a decision which was followed by Law, J., in *Khan Stores v. A. J. Delawer* (8), [1959] E.A. 714 (T.). Davies, C.J., adopted the reasoning in *Gurdevi v. Md. Bakhish* (9) (1943), A.I.R. Lah. 65, where a full bench of seven judges differed from the earlier decision of the court in *Lal Chand's* case (2), and took the second of the two views I have mentioned, namely that interlocutory orders which are not purely formal or incidental are revisable.

But even the High Courts of India which have held that interlocutory orders in a suit cannot be the subject of revision unless they decide the suit itself, have held that proceedings before a suit is commenced, or after a suit has ended, and proceedings for which the legislature has provided an independent remedy or a different procedure, are not interlocutory proceedings and will, therefore, be open to interference in revision. Thus an application for leave to sue as a

pauper or to set aside an *ex parte* decree or to restore a suit dismissed for default have been held to be “cases” the decisions of which are revisable by the High Court under the section. The industry of counsel and my own researches have not led to the discovery of any case in India in which it was held that an order setting aside an *ex parte* decree was not revisable on the ground that it was not a “case decided”. The following are some of the cases in which it was held that such an order is revisable: *Ram Sarup v. Gaya Prasad* (10) (1926), 48 All. 175; *Ramanathan Chettyaar v. Baldeo Singh* (11) (1933), A.I.R. Rang. 110; *Firm Bhajan Ram-Gil Raj Mal v. Mt. Narain Devi* (12) (1926), A.I.R. Lah. 642; *Piroj Shah v. Qarib Shah* (13) (1926), A.I.R. Lah. 379; *Wiru Ram v. Amer Chand* (14) (1926), A.I.R. Lah. 344, and *Zenab d/o Sukhio v. Mahomed Haji Allahdino* (15) (1938), A.I.R. Sind. 76.

In *Ram Sarup v. Gaya Prasad* (10), there was an application for revision of an order setting aside an *ex parte* decree. It was held that the High Court could interfere in revision with the order setting aside the decree when the lower court had no power under O. IX, r. 13, of the Indian Civil Procedure Rules to do so. Lindsay, J., who delivered the first judgment said at p. 176 of the report:

“In my opinion we have before us a case which has been decided. It cannot with any show of reason be maintained that the order complained of is a mere interlocutory order passed in the course of the trial of the suit, for the suit had been brought to an end by the passing of the *ex parte* decree. At the time this order was made there was no suit pending between the parties. The proceedings in which the order was passed were quite distinct from the proceedings constituting the suit.

“The defendant had an *ex parte* decree given against him and was seeking to have it set aside under the provisions of O. IX, r. 13, which gives him a right to have the decree set aside provided he is able to satisfy the court which passed it that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. By these proceedings he was endeavouring to enforce a right which did not, and could not, come into existence until the suit had been decided. These later proceedings being distinct from those in the suit, no order passed in the course of them could possibly be an interlocutory order in the suit. . . .

“And this being so I have no doubt we have here a ‘case’ which has been decided”.

The other two judges constituting the court concurred.

In so far as the Tanganyika decisions are concerned, although Simmonds, J., took the narrower view in *Keshavji Jethabhai and Bros. Ltd. v. Mohanlal Kurji* (5), nevertheless, he held that an order releasing goods from attachment was not interlocutory and set aside the order in revision. In *Hooda Ltd. v. Rajwani* (3), however, Mahon, J., held that an order setting aside an *ex parte* decree was an interlocutory order, that is to say, an order other than the final judgment in the suit, that it was merely a part of a “case” and, therefore, that it was not subject to revision.

There is no definition of “case” in the Code. It is a word of wide import and should, I think, be given a wider meaning than “suit”. I do not think it would be profitable to embark on an investigation as to the meaning of an interlocutory order. The words “interlocutory order” do not appear in s. 115 and I prefer to adhere to the words of the section which falls to be interpreted and to decide, not whether the order now sought to be revised is an interlocutory order, but whether it is an order deciding a case. The proceedings in question were instituted after the suit had been decided and a decree issued.

They were separate and distinct proceedings. Giving the word “case” a wide meaning, as I think I must, the proceedings in my view constitute a “case” and the order setting aside the *ex parte* decree the “decision of a case” within the meaning of s. 115.

It is common ground that no appeal lay against the order setting aside the decree. There are conflicting decisions in India as to whether such an order could be attacked on an appeal from a final decree but, even if it could, I do not think that would be a bar to the exercise of the High Court’s revisional jurisdiction. When the proceedings to set aside the decree are treated as a “case”, no appeal lies to the High Court against the decision of that “case” as such. I am therefore of the opinion that the order was revisable by the High Court.

I turn now to the question whether the district court had jurisdiction to extend the time for filing the application to set aside the *ex parte* decree, for it was on the ground that the district court had no jurisdiction to do so that the High Court restored the *ex parte* decree. Judgment was entered against the appellant in default of appearance under the provisions of r. 7 (b) of the 1955 Rules. That was on May 6, 1960, and the decree was issued on May 20, 1960. The application to set aside the decree was made under r. 17 of the 1955 Rules and the application to extend the time for making the application under r. 23 (1). Those rules provide:

- “17. Where judgment has been passed pursuant to r. 7 (b), r. 14 and r. 15, it shall be lawful for the court, upon due application being made by an aggrieved party within six weeks from the date of the judgment, to set aside or vary such judgment upon such terms as may be considered by the court to be just, provided that where a decree has been issued prior to the filing of the application, the provisions of the Law of Limitation shall apply”.
- “23. (1) The court may for sufficient reason on the application of any party extend any period of time prescribed in these rules subject to such order as to costs and any other conditions as it may think fit. Such application may be *ex parte* unless the court at any stage otherwise directs.”

Since a decree had been issued the provisions of the Law of Limitation applied. Under art. 164 of the First Schedule to the Indian Limitation Act, 1908, which has been applied to Tanganyika, the time within which an application to set aside an *ex parte* decree must be made is thirty days from:

“the date of the decree or, where the summons was not duly served, when the application has knowledge of the decree.”

The appellant admitted that he had knowledge of the decree on July 23, 1960. As the application to set aside the decree was not made until February 18, 1961, it was well out of time. There is no power under the Limitation Act to extend the time for making an application to set aside an *ex parte* decree.

The district court held that there was power to extend the time for making the application under the provisions of r. 23 (1) of the 1955 Rules, but the High Court held that r. 23 (1) had no application in the circumstances. In his ruling Williams, J., said:

“It [r. 23 (1)] applies to ‘any period of time prescribed by these rules.’ The period prescribed in r. 17 is six weeks except that when a decree has been issued not only does the period prescribed in the Limitation Act apply but all the relevant ‘provisions of the Law of Limitation’. It could easily have been stated that it was only the provision as to the length of the period which was made applicable. As that was not done and as extension

of time is an essential part of the Law of Limitation it is in my view that law which must have been intended to govern extension.”

I think the view which Williams, J., took is correct. Mr. Sayani submitted that as art. 164 is part of the Law of Limitation which is made applicable by r. 17 when a decree has been passed, then the period of limitation prescribed in that article is a period prescribed in the rules. But, as the learned judge observed, it is not merely art. 164 which is made applicable, but the Law of Limitation and under the Law of Limitation the period prescribed cannot be extended. If the intention had been otherwise surely reference would have been made, not to the Law of Limitation, but to the period prescribed by art. 164.

Mr. Sayani’s final submission was that even if the High Court had jurisdiction to revise the order and the district court had no power to grant an extension of time, the exercise of the High Court’s revisional powers is discretionary and should only be used where there has been injustice or irreparable injury. He submitted that there was no injustice or irreparable injury in the present case since all the respondent had to do was to prove his claim.

As I have indicated, this was not a case where the subordinate court merely exercised jurisdiction vested in it illegally or with material irregularity: by granting an extension of time to file the application to set aside the *ex parte* decree it acted without jurisdiction and para. (a) of s. 115 applies. The respondent was wrongly deprived of the benefit of a final decree against the appellant and I find it impossible to say that it has suffered no injustice: see *Wiru Ram v. Amer Chand* (14).

I would therefore dismiss the appeal with costs.

**Sir Trevor Gould Ag V-P:** I have had the advantage of reading the judgment of the learned President. I agree with his reasoning and conclusions and there is nothing which I can usefully add.

**Newbold JA:** I agree. I should wish to add that this is the type of case which tends to bring the administration of justice into disrepute. From such facts as are disclosed on the record there would appear to have been scandalous delay on the part of the advocates for the appellant at almost every stage of the numerous proceedings. Further, at the hearing of the appeal the advocate for the appellant admitted that his certificate on the record was incorrect and he was informed that he might be called upon to show cause why he should not pay the costs of making up the record himself – a course which would not now be possible without further delay in the decision of this case. In essence this is a case in which a decree for the not very considerable sum of about Shs. 1,600/- was issued in May, 1960, in a resident magistrate’s court and nearly three years later the question of whether that decree is valid is still being ventilated. If the plaint was properly served there would appear to be an injustice to the decree holder; if it was not properly served there would appear to be an injustice to the appellant which, however, could have been corrected if the necessary steps had been taken in time. They were not, and at almost every stage there was scandalous delay. If any injustice to the appellant exists it thus arises from this delay. I also consider that the conflicting affidavits of the process server should be drawn to the attention of the responsible authority.

*Appeal dismissed.*

For the appellant:

*NR Sayani*

*Sayani & Co., Dar-es-Salaam*

For the respondent:

*RN Donaldson and BD Thanki*

*Donaldson & Wood, Tanga*

**Re Abdul Mohamed Kassam Alibhai (Debtor)**  
**[1963] 1 EA 54 (HCT)**

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 14 February 1963                          |
| <b>Case Number:</b>      | 40/1961                                   |
| <b>Before:</b>           | Sir Ralph Windham CJ                      |
| <b>Sourced by:</b>       | LawAfrica                                 |

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*[1] Bankruptcy – Scheme of arrangement with creditors – Approval of court – Reasonable security for payment of not less than 5s. in the pound – Proposal that payment under composition scheme be guaranteed by third party – Bankruptcy Ordinance (Cap. 25), s. 18 (10) and s. 29 (3) (T.).*

**Editor’s Summary**

A debtor applied under s. 18 of the Bankruptcy Ordinance for approval of a composition scheme proposed by him and in support of this proposal it was suggested that the payments to be made under the scheme should be guaranteed by a third party. Section 18 (10) of the Ordinance provides that the court shall refuse to approve the proposal “unless it provides reasonable security for the payment of not less than five shillings in the pound on all the unsecured debts provable against the debtor’s estate”.

**Held** – the suggestion that a third party would guarantee the payments due under the scheme did not amount to a providing, by the proposal itself, of reasonable security such as is required by s. 18 (10) and even if it did, it was not possible to decide on the fact of the scheme whether the suggested security was reasonable. Accordingly the application to approve the scheme was refused.

Application refused.

**Cases referred to in judgment:**

(1) *In re Webb*, [1914] 3 K.B. 387; [1914–15] All E.R. Rep. 784.

**Judgment**

**Sir Ralph Windham CJ:** This is an application under s. 18 of the Bankruptcy Ordinance, for approval of a scheme of composition proposed by the applicant debtor. It is conceded on the debtor’s behalf that facts exist on proof of which the court would be required either to refuse, suspend or attach conditions to his discharge, namely the facts set out both in para. (a) and in para. (d) of s. 29 (3) of the Ordinance; in

accordance with s. 18 (10), therefore, I must refuse to approve the proposal

“unless it provides reasonable security for the payment of not less than five shillings in the pound on all the unsecured debts provable against the debtor’s estate”.

In the present case the only mention of any security in the proposal is in para. 4 of it, which states:

“the payment of the composition to be secured in the following manner: Mr. Kassamali Dhanji Mitha, a merchant of P.O. Box No. 15152, Dar-es-Salaam, will guarantee the due payment of each instalment of the composition”.

I cannot hold that this amounts to a providing, by the proposal itself, of reasonable security such as is required by s. 18 (10). It amounts rather to an agreement upon some collateral security, and no more; and that is not sufficient. In any



event it is not possible to decide on the face of the scheme, coupled with matters of which the Court may reasonably take judicial notice, whether the security agreed upon, even if it could be said to be provided by the proposal itself, is reasonable. There is nothing to indicate the financial standing of Mr. Kassamali Dhanji Mitha, a gentleman whose name, incidentally, does not even appear in the current Dar-es-Salaam telephone directory. Nor is it relevant that the creditors have, in the proposal, agreed to the giving of this collateral security. As was said by Cozens-Hardy, M.R., in *In re Webb* (1), [1914] 3 K.B. 387, at p. 391, where a similar application was being considered:

“it does not matter in the least, under these circumstances, what are the views of the creditors in the matter”;

and Swinfen Eady, L.J., went on to observe, at p. 394:

“It seems to me that it cannot be contended that it is sufficient for the creditors to have accepted the scheme. That is so in every case where the scheme comes before the court”.

The present application is very similar, in its legally relevant features, to that which was refused in this court by Daniel, Ag. J, on March 27, 1962, in Bankruptcy Cause No. 5 of 1959. On similar grounds I refuse to approve the proposal in the present case. I would add that, even if I had not been of the opinion that there had been a failure to comply with the requirements of s. 18 (10) of the Bankruptcy Ordinance, I am very doubtful, having regard to all the circumstances of the case and in particular the debtor's history of trading failures, whether I would have approved the composition in exercise of the discretion still reserved to me under the remaining provisions of s. 18.

*Application refused.*

For the debtor:

*BP Dave*

*BP Dave*, Dar-es-Salaam

For the Official Receiver:

*WDW Sloan*

*WDW Sloan*, Dar-es-Salaam

## **Jaffer Gulamhussein Ismail v Republic** **[1963] 1 EA 55 (CAD)**

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| <b>Division:</b>         | Court of Appeal at Dar-Es-Salaam                                 |
| <b>Date of judgment:</b> | 21 February 1963   |
| <b>Case Number:</b>      | 17/1963  |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold<br>JA |
| <b>Sourced by:</b>       | LawAfrica  |
| <b>Appeal from:</b>      | High Court of Tanganyika – Biron, J                              |

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*[1] Statute – Interpretation – Provision of Criminal Procedure Code repealed and re-enacted – Repealed provision the subject of previous judicial interpretation – Whether the provision as re-enacted should receive same interpretation – Appellate Jurisdiction Ordinance, 1961, s. 8 (4) (T.) – Criminal Procedure Code, s. 325 and s. 337 (T.).*

*[2] Appeal – Criminal law – Practice – Accused acquitted by District Court – Appeal by prosecution by way of case stated to High Court – Appeal allowed by High Court – Appeal by accused to Court of Appeal – Whether appeal competent – Appellate Jurisdiction Ordinance, 1961, s. 8 (4) (T.) – Criminal Procedure Code, s. 337 (T.).*

### **Editor's Summary**

The accused was charged on eleven counts with stealing but was acquitted by the district court. On appeal by the prosecution to the High Court by way

of case stated the judge remitted the case to the district court with a direction that the accused be convicted on the eleven counts. Section 337 of the Criminal Procedure Code provides that a decision of the High Court in respect of a case stated to it shall be final and conclusive on all parties, but s. 8 (4) of the Appellate Jurisdiction Ordinance, 1961, provides that either party to the proceedings under Part X of the Criminal Procedure Code may appeal to the Court of Appeal on a matter of law but not on a matter of fact. Further the provisions of s. 8 (4) are in terms similar to those of s. 325 of the Criminal Procedure Code which was repealed by the Appellate Jurisdiction Ordinance. On an appeal by the accused to the Court of Appeal, it was submitted that the conflict between s. 337 and s. 8 (4) should be resolved on the basis that s. 8 (4) had impliedly repealed the provisions of s. 337.

**Held –**

- (i) the Appellate Jurisdiction Ordinance, 1961, is not truly a new enactment, but is in substance a re-enactment of existing provisions and unless there is a clear intention to the contrary the use of any words which had previously received judicial interpretation would normally result in a presumed intention that the re-enacted words should receive a similar interpretation.
- (ii) the Court of Appeal in *Johnson v. R.* (1951), 18 E.A.C.A. 278, decided that s. 325 of the Criminal Procedure Code must be read subject to s. 337 and that under s. 337 no appeal lies from the decision of the High Court on the question of law arising on a case stated, and accordingly the legislature, when replacing s. 325 by s. 8 (4) of the Appellate Jurisdiction Ordinance, 1961, must have intended that the words in s. 8 (4) should receive the same meaning as that given by the Court of Appeal to the words in s. 325.
- (iii) the legislature having had the opportunity when enacting the Appellate Jurisdiction Ordinance of resolving the conflict between s. 337 and s. 325 of the Criminal Procedure Code by using a different form of words in s. 8 (4) of the Ordinance, and not having done so, there was no good reason for implying a repeal of s. 337 by s. 8 (4).
- (iv) under s. 337 of the Criminal Procedure Code no appeal lies from the decision of the High Court on the question of law arising on a case stated and accordingly the appeal was incompetent and must be struck out.

Appeal struck out.

**Case referred to:**

- (1) *Johnson v. R.* (1951), 18 E.A.C.A. 278.

**Judgment**

**Sir Ronald Sinclair P:** read the following judgment of the Court:

The Appellate Jurisdiction Ordinance, 1961, was enacted in order to set out the circumstances in which an appeal will lie to the Court of Appeal for Eastern Africa as constituted under the Eastern Africa Court of Appeal Order-in-Council, 1961, and also to make provision for appeals to Her Majesty in Council. An examination of the provisions of the Ordinance shows that in almost every respect the circumstances in which an appeal will lie to the Court of Appeal as constituted by the 1961 Order-in-Council are precisely the same as those in which an appeal previously lay to the old Court of Appeal. The Appellate

Jurisdiction Ordinance is not truly a new enactment, but is in substance a re-enactment of existing provisions. In these circumstances, unless there is a clear intention to the contrary the use of any words which had previously received judicial interpretation would normally result in a presumed intention that the re-enacted words should receive a similar interpretation.

“ . . . in the case of statutes consolidating former law or adopting from former Acts words which have been judicially construed, the case law on the enactments consolidated or copied may be of great value in interpretation”

Craies on Statute Law (5th Edn.) pp. 9 – 10.

There is a clear conflict between the words of s. 8 (4) of the Appellate Jurisdiction Ordinance and those of s. 337 of the Criminal Procedure Code. The conflict in so far as it is material to this appeal is precisely the same as that which existed between s. 325 and s. 337 of the Criminal Procedure Code when *Johnson v. R.* (1) (1951), 18 E.A.C.A. 278, was decided. The legislature when replacing s. 325 by s. 8 (4) of the Appellate Jurisdiction Ordinance must, in the light of what we have said earlier, have intended the same words, in so far as they relate to appeals by way of case stated, to receive the same meaning.

It was argued that the conflict should be resolved on the basis of the later provision impliedly repealing the earlier, but, as we have already pointed out, this is not truly a case of a later provision. The legislature having had the opportunity of resolving this conflict by using a different form of words did not choose to do so, but continued to use words which had been the subject of a judicial decision resolving the conflict.

It seems to us, therefore, in these circumstances that there is no good reason for implying a repeal of the clear provisions of s. 337 of the Criminal Procedure Code.

The appeal is accordingly struck out as incompetent.

*Appeal struck out.*

For the appellant:

*WD Fraser Murray*

*Fraser Murray Thornton & Co., Dar-es-Salaam*

For the respondent:

*AM Troup* (State Attorney, Tanganyika)

*The Attorney-General, Tanganyika*

**Jowett Lyaboga v Bakasonga and others**  
[1963] 1 EA 57 (HCU)

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| <b>Division:</b>         | High Court of Uganda at Kampala      |
| <b>Date of judgment:</b> | 22 February 1963                     |
| <b>Case Number:</b>      | 101/1962                             |
| <b>Before:</b>           | Bennett Ag CJ, Sheridan and Jones JJ |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Constitutional law – Busoga District Council – Membership of Council – Election – Council empowered to make provision for its membership by resolution – Council’s resolution to be approved by Governor before it can become effective – Proviso that nine-tenths of members of Council must be directly elected – Resolution passed by Council providing for sixty-seven elected members, six specially elected members and eleven hereditary Saza Chiefs – Resolution contrary to proviso – Council dissolved – Resolution approved by Governor in part disapproving provisions for Saza Chiefs as members of Council – Sixty-seven members elected by direct election – Elected members elected first six defendants as specially elected members – No previous notice of election of specially elected members published as required by resolution – Validity of election of specially elected members – Civil Procedure (Constitutional Cases) Act, 1962, s. 2 (2) (b) (U.) – Local Administration Ordinance, 1962, s. 3 (1) (b) (U.) – Uganda (Constitution) Order-in-Council, 1962, s. 12, s. 13 and Second Schedule, s. 74 and s. 75 (U.) – Interpretation and General Clauses Ordinance (Cap. 1), s. 21 (U.) – Civil Procedure Rules, O. 1, r. 8 (U.).*

*[2] Constitutional law – Kyabazinga of Busoga – Election of – Busoga District Council empowered to make provision for mode of appointment of Kyabazinga and his tenure of office – No such resolution passed by District Council – Seventh defendant elected Kyabazinga – Validity of election – Uganda (Constitution) Order-in-Council, 1962, s. 13 and Second Schedule, s. 74 and s. 75 (U.).*

### **Editor's Summary**

Under s. 74 of the Second Schedule to the Uganda (Constitution) Order-in-Council, 1962, the District Council of Busoga was empowered to make provision for its membership by passing a resolution and under s. 75 (c) such a resolution had to be approved by the Governor before it could become effective. The council passed a resolution providing that the council shall consist of eighty-four members comprised of sixty-seven directly elected members, six specially elected members and eleven hereditary Saza chiefs and dissolved itself. In this form the resolution offended against the proviso to s. 74 which required that at least nine-tenths of the members should be elected members. The resolution was approved by the Governor in part but the provision regarding eleven hereditary Saza chiefs was disapproved. Subsequently elections to the council were held for the election of sixty-seven members and at a meeting of the council attended by sixty-six elected members the first six defendants were elected as specially elected members of the council. On the following day the council elected the seventh defendant as the Kyabazinga of Busoga. Although the regulations in sch. 4 of the resolution provided that the Secretary-General should publish notice notifying the date, time and place fixed for the election of specially elected members at least seven days before the election, no such notice was published. Further the council had not passed any resolution as required by s. 75 (1) to make provision for the mode of appointment of the Kyabazinga of Busoga and his tenure of office and his ceremonial functions. In an action by the plaintiff, *inter alia*, for declaration that the first six defendants were not lawfully elected as special members of the council and that the seventh defendant was not lawfully the Kyabazinga of Busoga, it was submitted for the defendants that the irregularity in failing to give seven days notice of the election of specially elected members was curable under s. 21 of the Interpretation and General Clauses Ordinance and that the council was entitled to elect the seventh defendant as the Kyabazinga by a simple resolution under s. 75 (3).

### **Held –**

- (i) under s. 75 of the Second Schedule to the Uganda (Constitution) Order-in-Council, 1962, it was not within the powers of the Governor to approve the resolution of the Busoga District Council in part and accordingly there had been no valid resolution of the council which had received the Governor's approval with the result that the council had never been properly constituted in accordance with the requirements of s. 74 since August 10, 1962, when it dissolved itself.
- (ii) the plaintiff was entitled to the declarations which he sought since the first six defendants could not be said to have been lawfully elected to a body which had never been properly constituted and such a body could not be competent to elect the Kyabazinga.
- (iii) s. 21 of the Interpretation and General Clauses Ordinance applies only in the case of boards, commissions, committees or similar bodies and is not applicable to a local authority; accordingly s. 21 was not apt to cure the irregularity in respect of failure to give seven days notice of the election of specially elected members.

- (iv) the Ministry of Regional Administration had no more power than had the council to waive the requirements as to notice of specially elected members and the election of the first six defendants was invalid by reason of the failure to give such notice.



- (v) s. 75 (3) referred to the making of an acting or temporary appointment and could not be invoked to assist the seventh defendant who claimed to be the substantive head, namely, the Kyabazinga of Busoga.
- (vi) although s. 13 of the Uganda (Constitution) Order-in-Council, 1962, established the office of the Kyabazinga of Busoga it was still necessary for the council under s. 75 (3) to have prescribed the mode of appointment of the Kyabazinga and s. 75 (1) itself conferred no power on the council to appoint or elect the Kyabazinga prior to the passing of a resolution prescribing the method of his appointment; accordingly the council was not competent to make a substantive appointment of the seventh defendant as the Kyabazinga of Busoga.
- (vii) this was not a representative suit within O. 1, r. 8 of the Civil Procedure Rules because the first six defendants were not sued as representing the Busoga District Council but as members of it;
- (viii) the Busoga District Council was not an interested party to the suit but even if it were the omission to make the council a party to the suit did not prevent the court in its discretion from granting the declarations sought by the plaintiff.

Declarations that the first six defendants were not lawfully elected as specially elected members and that the seventh defendant was not lawfully the Kyabazinga of Busoga.

Injunctions refused.

#### **Cases referred to in judgment:**

- (1) *Lucas v. Martin* (1888), 37 Ch. D. 597.
- (2) *Daudi Ndibarema v. The Enganzi of Ankole*, [1959] E.A. 552 (U.); [1960] E.A. 47 (C.A.).
- (3) *New York Life Assurance Co. v. Public Trustee*, [1924] 2 Ch. 101.

#### **Judgment**

**Bennett Ag CJ:** read the following judgment of the court:

By a plaint filed in the High Court district registry at Jinja on October 17, 1962, the plaintiff, an elected member of the Busoga District Council, claims:

- (a) a declaration that the first six defendants were not lawfully elected as specially elected members of the council and are not entitled to act in such capacity;
- (b) a declaration that the seventh defendant is not lawfully Kyabazinga of Busoga;
- (c) an injunction to restrain the said six defendants from acting in the capacity of members of the council;
- (d) an injunction to restrain the seventh defendant from exercising any of the powers and duties of Kyabazinga of Busoga.

By their written statement of defence all the defendants deny that the plaintiff is entitled to any of the reliefs claimed.

As the proceedings involve the determination of a question concerning the constitutional arrangements of Uganda a certificate was granted under s. 2 (2) (b) of the Civil Procedure (Constitutional Cases) Act, 1962, for them to be heard by three judges.

The facts are agreed. On August 10, 1962, the Busoga District Council, which together with the Kyabazinga, was established as the local administration of

Busoga by the Local Administrations Ordinance, 1962, s. 3 (1) (b), passed a resolution entitled “The Busoga Constitution Resolution” (annexure “A” to the plaint). The resolution, which made provision for the membership of the council, was passed under the powers conferred by s. 74 of the Second Schedule to the Uganda (Constitution) Order-in-Council, 1962, (the then Constitution of Uganda), which came into operation on March 1, 1962, and ceased to have effect on October 9, 1962. Section 74 (1), (2) and (4) provided:

- “74. (1) There shall be a council for each district, which shall have such functions in relation to the administration of the district as may be conferred upon it by any law.
- “(2) The council of a district may by resolution make provision for its own membership:  
Provided that of the members of each council at least nine-tenths shall be elected in accordance with the provisions of this section.
- “(4) A resolution of a council of a district for the purposes of this section shall not be passed unless it has been supported by the votes of not less than two-thirds of all the members of the council.”

This provision must be read in conjunction with s. 12 of the Order-in-Council itself, which provided:

- “12. (1) Any district council established for a district under the African Local Governments Ordinance or the District Administration (District Councils) Ordinance, 1955, as amended, and existing immediately before the appointed day shall be deemed to have been established as from the appointed day under s. 74 of the Constitution of Uganda as the council for that district.
- “(2) Any such council shall, for the period beginning on the appointed day and ending on the 1st day of September, 1963, or on such earlier date as may be prescribed in relation to that council by the legislature of Uganda, be deemed (except for the purposes of s. 13 of this Order and s. 75 of the Constitution of Uganda) to be duly constituted in accordance with the provisions of s. 74 of the Constitution of Uganda notwithstanding that its membership may not accord with the requirements of that section, and, during that period:
  - (a) the council shall have such membership as may be so prescribed;
  - (b) sub-s. (4) of s. 74 of the Constitution of Uganda shall not have effect in relation to that council;
  - (c) a resolution of the council for the purposes of the said section shall not have effect unless it is approved by the Governor.
- “(3) . . . . .”

Paragraph 2 of the resolution reads:

- “2.(1) The Lukiko shall consist of eighty-four members comprised of
  - (a) Sixty-seven directly elected members;
  - (b) Six specially elected members;
  - (c) Eleven hereditary Saza chiefs as listed at Schedule 1 who shall have no vote on motions of ‘no confidence’ or matters concerning finance.”

In this form the resolution offended against the proviso to s. 74 (2) which required that at least nine-tenths of the members should be elected members. The council dissolved itself on the same day having passed the resolution. The resolution was forwarded to the Governor for his approval under s. 12 (2) (c) of the Order-in-Council. By a letter dated September 14, 1962 (exhibit A), the

Permanent Secretary to the Ministry of Regional Administrations informed the Secretary-General, Busoga, that the Governor had approved the resolution “with the exception of that part of the resolution in para. 2 (1) (c) of the resolution which has not been approved.”

It is a reasonable inference that partial approval was given in order to make the resolution comply with the requirement that nine-tenths of the members of the council should be elected. But it is a crucial question whether the Governor had power to approve the resolution in part. The phrasing of the letter when read with the resolution is ambiguous. If the Governor’s letter can be regarded as modifying the resolution it probably had the effect of reducing the membership of the council from eighty-four to seventy-three, but it is not altogether clear whether this result was intended. However that may be, can it be said that the resolution as modified by the Governor (acting, presumably, on advice) was any longer the resolution of the council? No authorities on this point have been cited from the Bar, but we have derived some assistance from an English decision *Lucas v. Martin* (1) (1888), 37 Ch. D. 597. The facts of the case are set out in the head note thus:

“The trustee in a bankruptcy entered into a written agreement with the defendants whereby it was agreed that the defendants should purchase the assets of the bankrupt for such a sum as would pay the expenses of the bankruptcy and the preferential debts in full within fourteen days after the approval of the scheme by the court, and a certain composition to the unsecured creditors, and that on the approval of the scheme by the court the bankruptcy should be annulled. The creditors by a requisite majority passed a resolution agreeing to the scheme of arrangement as proposed, but adding a clause that a bond should be given by the defendants for payment of the money. The court afterwards approved the agreement signed by the defendants, and annulled the bankruptcy.”

It was held that the creditors, not having accepted the scheme proposed in the form in which the defendants had agreed to it, there had been no approval of the scheme by the court. Cotton, L.J., said:

“It is said that therefore we ought to consider that the court when it approved of the arrangement, or scheme, or composition in these terms intended to dispense with that clause which had been introduced by the creditors. Now, in my opinion, the court has no such power, because although it might give directions where a scheme did not make any provision for the terms upon which the property is to be vested in the purchasers, yet where there is an express agreement by the creditors by their resolution that a certain term shall be imposed, in my opinion the court has no jurisdiction to depart from that, and to say although we approve that which has been done by the creditors, we strike out that which we must consider as important, as in fact it was imposed by their resolution.”

To return to the instant case, had the framers of the Order-in-Council intended that the Governor should have had the power to modify a resolution by assenting to part only, one would have expected to find a clear indication of that intention in s. 12 (2) (c). Sub-s. (c) might have read:

“only such parts of a resolution of a council for the purposes of the said section shall have effect as are approved by the Governor.”

In our judgment it was not within the powers of the Governor to approve the resolution in part, and there has been no valid resolution of the council which has received the Governor’s approval. In the result, we have come to the conclusion that the council has never been properly constituted since August 10, 1962, when it dissolved itself.

This conclusion would be sufficient to entitle the plaintiff to the declarations which he seeks since the first six defendants can hardly be said to have been lawfully elected to a body which has never been properly constituted and such a body would not be competent to elect a Kyabazinga.

However, in case it should be held elsewhere that we have come to a wrong conclusion as to the scope of the Governor's powers and as to whether or not the council has been properly constituted, we shall proceed to consider the other grounds upon which the election of the six defendants and the election of the seventh defendant have been attacked. It will be observed that in the plaint the plaintiff's case has been presented on the footing that the council's resolution of August 10, was a valid resolution. It is not alleged in the plaint that the resolution of August 10, 1962, was invalid nor are facts pleaded from which the court would be entitled to infer that the resolution was invalid. Had it not been for para. 2 of the written statement of defence, Mr. Wilkinson, who appeared for the plaintiff, would not have been entitled to raise the matter at all: see O. 6, r. 5 of the Civil Procedure Rules.

To return to the facts, elections to the district council were held on September 26, 1962. On September 28, 1962, the council met for the purpose of electing the six specially elected members. Sixty-six elected members, only one short of the prescribed number, were present. Although the regulations in Schedule 4 to the resolution provided that the Secretary-General should publish a notice notifying the date, time and place fixed for the election of specially elected members at least seven days before the election, no such notice was published. The minutes of the council (annexure "B" to the plaint) record that the chairman informed the council that it was necessary to waive the regulations relating to the nomination of specially elected members as Independence Day was drawing near, and the Ministry of Regional Administrations had given written authority for the holding of a meeting to elect the specially elected members. After the chairman had made his announcement 16 of the opposition members walked out of the meeting in protest and in their absence the council purported to elect the first six defendants unopposed as the six specially elected members.

Mr. Clerk, for the defendants, relies upon s. 21 of the Interpretation and General Clauses Ordinance (Cap. 1), to cure the irregularity in failing to give seven day's notice of the election of specially elected members. Section 21 reads:

- "21. Where by or under any Ordinance, any board, commission, committee or similar body whether corporate or unincorporate, is established, then, unless the contrary intention appears, the powers of such board, commission, committee or similar body shall not be affected by:
- (a) any vacancy in the membership thereof;
  - (b) the fact that it is afterwards discovered that there was some defect in the appointment or qualification of a person purporting to be a member thereof; or
  - (c) the fact that there was any minor irregularity in the convening of any meeting thereof."

It will be observed that the section only applies in the case of boards, commissions, committees or similar bodies. We do not consider that a local authority, can be likened to a board, commission, or committee, and in our opinion the section is not apt to cure the irregularity.

In our judgment the Ministry of Regional Administrations had no more power than had the council to waive the requirements as to notice of specially elected members. In these circumstances we consider that the election of the first six defendants was invalid by reason of the failure to give the necessary notice.

On the following day (September 29), the council elected the seventh defendant Kyabazinga of Busoga, also unopposed. Mr. Clerk contends that the council was entitled to do so by a simple resolution under s. 75 (3) of the then Constitution, and that since there was a quorum present the appointment was valid. Section 75 (3) reads:

“If the office of the constitutional head of a district is vacant or if the constitutional head is for any reason unable to perform the functions of his office, the council of the district may by resolution appoint a person to act as constitutional head and any person appointed to act shall continue to act for the period of his appointment or, if no such period is appointed, until his appointment is revoked by the council by resolution.”

In our view this provision refers to the making of an acting or temporary appointment and cannot be invoked to assist the seventh defendant who claims to be the substantive constitutional head of Busoga (see para. 6 of the written statement of defence). Although s. 13 of the Order-in-Council established the office of Kyabazinga of Busoga it was still necessary for the council by resolution under s. 75 (1) of the then constitution to make provision for the mode of appointment of persons to that office, their tenure of office and their ceremonial functions. Section 75 (1) itself conferred no power on the council to appoint or elect a Kyabazinga prior to the passing of a resolution prescribing the method of his appointment. The proviso that a resolution establishing the office of constitutional head should not be passed unless it had been supported by the votes of not less than two-thirds of all the members of the council and should not have effect unless it was approved by the Governor did not apply in the case of Busoga as the office had already been established by s. 13 (1) of the Order-in-Council. The proviso was probably intended to apply only to districts where the office of constitutional head had not yet been established. While s. 75 (1) may be permissive it was necessary for the council to legislate under it if it desired to make a substantive appointment to the office of Kyabazinga.

It is contended on behalf of the defendants that the previous Kyabazinga had vacated that office by virtue of s. 13 (3) of the Order-in-Council which reads:

“(3) Any person who, immediately before the appointed day, holds an office referred to in sub-s. (1) or sub-s. (2) of this section shall be deemed to have been appointed as from the appointed day to that office.

“Provided that any such person shall vacate that office when the council of the district for which the office is established first meets after it has been duly constituted in accordance with the requirements of s. 74 of the Constitution of Uganda.”

This contention presupposes that there was a meeting of a duly constituted council. As we have said, in our view the council was never duly constituted in accordance with the requirements of s. 74. If we were wrong in so holding, the fact remains that the council has never prescribed by resolution under s. 75 the method of making appointments to the office of Kyabazinga. In these circumstances the council was not competent to make a substantive appointment to the office.

Mr. Clerk has raised certain procedural objections to the plaintiff's suit. He contends that this is a representative suit falling within O. 1, r. 8, and that the court has not granted leave for the first six defendants to defend the suit on behalf of other members of the council who elected them. In our view this is not a representative suit since the first six defendants are not being sued as representing the council but as members of it whose seats are in jeopardy. If the first six defendants desired to represent the other members of the council

it was for them to seek the permission of the court to defend the suit on behalf of or for the benefit of the other members of the council.

As to the criticism that the electors who voted for the plaintiff have not been made parties to the suit, the plaintiff is not claiming to sue on behalf of anyone but himself, and in our opinion he has a sufficient interest in the subject matter of the suit to be entitled to maintain it.

Again it is said that a declaration is discretionary remedy and that the court ought not to grant it unless all parties interested are before the court: See Halsburys Laws of England (3rd Edn.), Vol. 22, p. 749. It is contended that the Busoga District Council is an interested party and that in as much as it has not been made a party to the suit a declaration should not be granted. Reliance is placed upon a judgment of this court in *Daudi Ndibarema v. The Enganzi of Ankole* (2), [1959] E.A. 552 (U.). In that case one of the reliefs sought by the plaintiff was a declaration that certain resolutions of the General Purposes Committee of the Ankole District Council were null and void as being ultra vires. The learned trial judge declined to grant a declaration on the ground that the district council was not a party to the suit, and that the defendants had no control over its actions. The Court of Appeal did not share the trial judge's qualms and granted this particular declaration (See *Daudi Ndibarema & Others v. The Enganzi of Ankole & Others* (2), [1960] E.A. 47 (C.A.)). Although the point is not specifically dealt with in the judgment of the learned President, it is difficult to see why the Court of Appeal should have reversed the decision of the trial judge unless it disagreed with his view that the district council was an interested party.

In the instant case the court has not been asked to make a declaration that the Busoga District Council is not properly constituted, and the fact that the plaintiff's counsel has relied upon the argument that the council is not properly constituted does not, in our view, involve the proposition that the council is a necessary party. The declarations which the plaintiff seeks concern the validity of the election of the first six defendants to the council and of the seventh defendant's election to the office of Kyabazinga. We do not consider that the Busoga District Council was an interested party. Even if it was we consider that the omission to make the council a party should not be permitted to stand in the way of granting the declaration asked for, although, as was said by Atkin, L.J. (as he then was), in a case where a declaration was granted in the absence of all the interested parties, this case ought not to be made a precedent: (See *New York Life Assurance Company v. Public Trustee* (3), [1924] 2 Ch. 101, at p. 122.)

For the reasons which we have attempted to state we consider that the plaintiff is entitled to the declaration which he seeks. We do not take the same view as to the injunctions asked for in the plaint. An injunction is also a discretionary remedy. In our view it would be idle to grant an injunction to restrain the first six defendants from taking part in the deliberations of a body which we do not believe to have been properly constituted and which is consequently incapable of transacting business. We are fully aware that if our conclusions are sound the constitutional stalemate which these proceedings have revealed can only be resolved by the holding of fresh elections, or by legislation. Nor are we disposed to grant an injunction (to use the words of the plaint) "to restrain the seventh defendant from exercising any of the powers and duties of the Kyabazinga of Busoga" since we are not satisfied of the necessity for an injunction at this stage. There will be declarations in the terms prayed in sub-para. (a) and (b) of the prayer for relief.

With regard to the matter of costs, it cannot fairly be said that the defendants or any of them were responsible for this litigation. It was not their fault that the district council passed an invalid resolution; or that the Governor's attempt to



save a hopeless situation was of no avail; or that the council flouted its own regulations when purporting to elect specially elected members to the council; or that the council failed to make regulations enabling it to make a substantive appointment to the office of Kyabazinga.

Had the defendants not contested the proceedings we should have been disposed to let the plaintiff bear his own costs. As the defendants have chosen to contest the proceedings we consider that costs should follow the event, and we order the defendants to pay the plaintiff's costs.

*Declarations that the first six defendants were not lawfully elected as specially elected members and that the seventh defendant was not lawfully the Kyabazinga of Busoga.*

For the plaintiff:

*PJ Wilkinson QC, B D'Silva and L Sebalu*  
*Wilkinson & Hunt, Kampala*

For the defendants:

*A Clerk*  
*Mayanja Clerk & Co., Kampala*

## **Republic v Indo Parsad Jamietram Dave** [1963] 1 EA 65 (HCT)

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| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 8 March 1963                              |
| <b>Case Number:</b>      | 40/1963                                   |
| <b>Before:</b>           | Sir Ralph Windham CJ                      |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Drugs – Chemist – Failing to keep poisons book – No allegation of the sale of any poison – Whether charge discloses any offence – Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws), s. 29 (T.) – Pharmacy and Poisons Ordinance (Cap. 94), s. 21 (T.).*

[2] *Criminal law – High Court – Revisional jurisdiction – Accused charged with committing offences under Ordinance not yet in force – Acts alleged also constituting offences under corresponding provisions of existing Ordinance – Pleas of guilty by accused – Convictions by magistrate – Power of High Court on revision to alter charges so as to charge offence under corresponding provisions of Ordinance which was in force when offences committed – Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws), s. 19 and s. 29 (T.) – Pharmacy and Poisons Ordinance (Cap. 94), s. 5, s. 21 and s. 36 (T.) – Criminal Appeal Act, 1907, s. 4 (1) – Criminal Procedure Code (Cap. 20), s. 319 (1), s. 329 (1) and s. 346 (T.) – Revised Laws and Annual Revision Ordinance, 1955, s. 15 (T.).*



### **Editor's Summary**

The accused was charged and convicted on his pleas of guilty of *inter alia* failing to keep a poisons book and failing to display a certificate of registration as a pharmacist contrary to s. 29 and s. 19 respectively of the Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws). This Ordinance was enacted on November 11, 1959, and it repealed the Poisons and Pharmacy Ordinance (Cap. 94), but it did not come into force until November 1, 1962. The particulars of the charge alleged that both the offences had been committed before September, 1962, when the repealed Pharmacy and Poisons Ordinance (Cap. 94) was in force. In revision the question was whether the court should allow the convictions to stand but alter the charges under s. 29 and s. 19 of the new Ordinance to charges under the corresponding sections of the repealed Ordinance, namely, s. 21 and s. 5 respectively.

**Held –**

- (i) the provisions of s. 319 (1), s. 329 (1) and s. 346 of the Criminal Procedure Code are wide enough to enable the court, acting on appeal or in revision, to do what the court of trial ought to have done, and accordingly the court had power to alter the charge and conviction under the appropriate section in the Pharmacy and Poisons Ordinance (Cap. 94) which was in force when the offence was committed, provided that the offence was in every essential the same under the old and new sections, and provided that no failure of justice would result from the alteration.
- (ii) s. 19 (1) of the Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws) was a reproduction of s. 5 of the Pharmacy and Poisons Ordinance (Cap. 94) almost verbatim and without any material alteration and no injustice had resulted to the accused from the mis-citation of the charging Ordinance and section; accordingly the charge and conviction from s. 19 (1) and (2) should be altered to s. 5 and s. 36 of Pharmacy and Poisons Ordinance (Cap. 94).
- (iii) under s. 29 (1) of the Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws) and under s. 21 (2) of the Pharmacy and Poisons Ordinance (Cap. 94) the offence is not failure to keep a poisons book but failure, by a person who has sold a “Part I poison”, to enter a note of the sale in a poisons book before delivering the poisons to the purchaser and obtaining the latter’s signature to the entry. There was no allegation that the accused had sold any poison and what the accused had purported to plead guilty to, namely, the mere non-keeping of a poisons book was not an offence at all. The charge under s. 29 was therefore bad ab initio as disclosing no offence and the proceedings upon it were a nullity.

Conviction for failing to keep a poisons book set aside; conviction for failing to display a certificate of registration affirmed.

**Cases referred to in judgment:**

- (1) *Meek v. Powell*, [1952] 1 K.B. 164; [1952] 1 All E.R. 347.
- (2) *R. v. Tuttle* (1929), 140 L.T. 701; [1929] All E.R. Rep. 107.

**Judgment**

**Sir Ralph Windham CJ:** This matter comes to me by way of revision. The accused was charged on four counts, the first and fourth being under the Pharmacy and Poisons Ordinance (Cap. 416) and the second and third under the Poisons Rules, for various offences connected with the carrying on of his business as a pharmacist. He pleaded guilty to all four counts, and was fined Shs. 1,600/- on the first count, Shs. 150/- on the second, Shs. 150/- on the third, and Shs. 100/- on the fourth, with the usual default terms in each case. I am not concerned with the second and third counts.

The first and fourth counts were framed under s. 29 and s. 19 respectively of the “Pharmacy and Poisons Ordinance, Cap. 416 of the Laws”. The reference is to the volumes of the “Revised Laws” of Tanganyika published in 1960, with the annual supplements thereto. The particulars alleged that the offence under the first count was committed between June 14, and August 15, 1962, and the offence under the fourth count on or about September 17, 1962. The Pharmacy and Poisons Ordinance, Cap. 416, was enacted on November 11, 1959, but s. 1 of it provided that it should

“come into operation upon such date as the Governor may, by notice in the *Gazette*, appoint”.

The date so appointed was November 1, 1962. Thus, when the offences were alleged to have been committed, the Ordinance under which the accused was

charged was not yet in force. That Ordinance, however, which I shall hereafter call the “new Ordinance”, repealed the Pharmacy and Poisons Ordinance, Cap. 94 in the 1947 edition of the Laws of Tanganyika, which I shall hereafter call the “old Ordinance”, re-enacting its provisions in substantially but by no means identically the same terms. The old Ordinance was thus still in force when the offences to which the accused pleaded guilty were committed. The question that I am asked to decide is whether the convictions ought to be quashed, by reason of their being for offences under an Ordinance not yet in force when they were committed, or whether I should let the convictions stand but alter the charges under s. 29 and s. 19 of the new Ordinance to charges under the corresponding sections in the old Ordinance, namely s. 21 and s. 5 respectively. The matter is not covered by s. 15 of the Revised Laws and Annual Revision Ordinance, 1955.

I have been referred to the English decisions in *Meek v. Powell* (1), [1952] 1 K.B. 164, and *R. v. Tuttle* (2), 140 L.T. 701. In *Meek v. Powell* (1), the position was the reverse of the present case, the accused having been charged under a section of an Act no longer in force when his offences were committed, instead of under the corresponding section of the Act which had repealed and in identical terms replaced it. It was held that, since the court of trial had not made the necessary alteration in the indictment before conviction, it was too late to ask the Court of Criminal Appeal to alter it, notwithstanding that no prejudice would have resulted to the accused; and the conviction was accordingly quashed. No mention appears to have been made of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, which reads:

“Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.”

In *R. v. Tuttle* (2), the position was exactly the same as in the present case, the accused having been charged under a section of an Act which, although it had been enacted, had not yet been brought into force when the offence was committed. The trial judge, before conviction, altered the indictment to one under the corresponding and almost identical section under the Act which was still in force when the offence was committed and which was repealed and substantially re-enacted by the new Act. It was held on appeal that the alteration was properly made by the trial court.

In my view the relevant provisions in the laws of Tanganyika, which are in more than one respect wider or more specific than those in force in England, are wide enough to enable this court, acting on appeal or (as here) in revision, to do what the court of trial ought to have done, and to alter the charge and the conviction to one under the appropriate section in the Ordinance which was in force when the offence was committed, provided that the offence was in every essential the same under the old and the new sections, and provided that no failure of justice will result, or may result, from the alteration. The particular provisions of the law which together enable this court to take such a course, as I see it, are the following sections of the Criminal Procedure Code:

First, s. 346, which is more specific in its terms than the proviso to s. 4 (1) of the English Criminal Appeal Act, 1907, and which provides, *inter alia*, that no finding, sentence or order shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint or charge unless it has in fact caused a failure of justice.

Secondly, s. 319 (1), which provides that in any appeal the High Court may make any amendment or any consequential or incidental order that may appear just and proper.

Thirdly, s. 329 (1) (a) which provides that the High Court, acting in revision, may, in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by, *inter alia*, s. 319.

Bearing in mind, then, what I hold to be these powers of the High Court acting in revision, I turn to counts 1 and 4 in the present case. I will deal first with count 4.

Count 4 is framed under s. 19 (1) of the new Ordinance, the offence being failure to exhibit a certificate of registration as a pharmacist while carrying on the business of a pharmacist. The particulars of the charge were properly framed to correspond with the wording of the section. Now s. 19 (1) reproduces s. 5 of the old Ordinance almost verbatim, and certainly without any material alteration whatever. Section 19 (2), which prescribes a maximum fine of Shs. 200/- for the contravention of s. 19 (1), replaces, in respect of that particular offence, the general penalty section in the old Ordinance, namely s. 36, which prescribed a general maximum penalty of six months' imprisonment or a fine of Shs. 1,000/-, or both. Clearly no injustice resulted to the accused from the mis-citation of the charging Ordinance and sections. His conviction and sentence will therefore stand, but I alter the charge and the conviction from s. 19 (1) and (2) of the Pharmacy and Poisons Ordinance, Cap. 416 of the Laws (i.e. the Revised Laws) to s. 5 and s. 36 of the Pharmacy and Poisons Ordinance, Cap. 49 of the "Laws of Tanganyika", 1947.

The position with regard to count 1, however, is different. It is framed under s. 29 of the new Ordinance. That section reproduces substantially, though by no means identically, the provisions of s. 21 in the old Ordinance. The offence, under both sections, is concerned with the making of entries of the sale of "Part I poisons" in what is called a Poisons Book. The offence under both the old and the new Ordinances is, briefly, failure to enter such sales in the Poisons Book. Section 29 (1) of the new Ordinance provides:

- "29. (1) Where any Part I poison is sold in the presence of the person by whom it is to be used, the seller shall not deliver it until –
  - (a) he has made or caused to be made an entry in a book kept for the purpose, to be called a Poisons Book, indicating in the form prescribed the date of the sale, the name and address of the purchaser and of the person, if any, by whom the certificate required under paragraph (b) of sub-s. (2) of s. 28 was given, the name and quantity of poison sold, and the purpose for which it is stated by the purchaser to be required; and
  - (b) the purchaser has affixed his signature to the aforesaid entry."

Section 21 (2) of the old Ordinance is worded almost identically. Section 21 (1) having referred to "any poison in Part I of the Poisons List", sub-s. (2) provides:

- "21. (2) The seller of such poison shall not deliver it until –
  - (a) he has made . . . ;"

and the sub-section proceeds exactly as s. 29 (1) in the new Ordinance.

The offence with which the accused was charged under s. 29, and to which he pleaded guilty, was described in the charge-sheet as "failing to keep poisons book"; and the particulars went on to aver that:

"The person charged, namely Indo Parsad Jamiyram Dave, the manager of Tanganyika Chemist, Dar-es-Salaam, from June 14, 1959, to August 15, 1962, did fail to keep a Poisons Book as required by law."

Clearly this charge disclosed no offence at all. Under s. 29 (1) of the new Ordinance, and similarly under s. 21 (2) of the old, the offence is not failure to

keep a Poisons Book; it is failure, by a person who has sold a Part I poison, to enter the sale in a Poisons Book before delivering it to the purchaser and obtaining the latter's signature to the entry. In short, there is no obligation to keep a Poisons Book at all unless and until one has sold poison, upon which event, of course, it is necessary to have a Poisons Book in order to make the required entry in it. In theory, at least, a pharmacist might never sell a Part I poison at all, in which event he need never keep a Poisons Book. But in the present case the charge does not allege that the accused sold any poison at all, an act which is prerequisite to the commission of any offence under s. 29 (1). It accordingly disclosed no offence; and what the accused purported to plead guilty to, namely the mere non-keeping of a Poisons Book, was not an offence at all. And the position would be exactly the same if I were to alter the charge to one under s. 21 (2) of the old Ordinance. The charge was bad ab initio as disclosing no offence, and the proceedings upon it were a nullity. The conviction of the accused on count 1 is therefore set aside, and the fine paid in respect of it must be returned to him forthwith. There is, of course, nothing to prevent the State from charging the accused afresh, for an offence contrary to s. 21 (2) of the old Ordinance, upon a charge properly framed so as to disclose an offence.

*Conviction for failing to keep a poisons book aside; conviction for failing to display a certificate of registration affirmed.*

For the Republic:

*AE Taylor* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

The accused did not appear and was not represented.

## **Govindji Popatlal v Premchand Raichand Limited** [1963] 1 EA 69 (CAN)

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|--------------------------|--|
| <b>Division:</b>         | Court of Appeal at Nairobi                                     |
| <b>Date of judgment:</b> | 16 January 1963  |
| <b>Case Number:</b>      | 3/1962   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Crawshaw JA |
| <b>Sourced by:</b>       | LawAfrica  |
| <b>Appeal from:</b>      | H.M. Supreme Court of Kenya – Mayers, J                        |

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[1] *Mortgage – Equitable mortgage by deposit of title deeds – Memorandum of equitable mortgage signed by mortgagor but not registered – Validity – Land Titles Ordinance (Cap. 159, 1948) (Cap. 282), s. 59 (K.) – Equitable Mortgages Ordinance (Cap. 152, 1948) (Cap. 291), s. 2 (K.) – Equitable Mortgage (Amendment) Ordinance, 1958, (K.) – Land Titles (Amendment) Ordinance, 1959, s. 9 (K.) – Interpretation and General Provisions Ordinance, 1956 (Cap. 2), s. 23 (3) (c) (K.).*

*[2] Money-lender – Loan – Loan secured by equitable mortgage by deposit of title deeds – Memorandum of equitable mortgage signed by mortgagor but not registered – Enforcement of repayment of loan – Whether transaction exempted from Money-lenders Ordinance – Money-lenders Ordinance (Cap. 307, 1948) (Cap. 528), s. 3 (1) (b) (K.).*

*[3] Statute – Retrospective operation – Lending litigation – Land Titles Ordinance (Cap. 159, 1948) (Cap. 282), s. 59 (K.) – Land Titles (Amendment) Ordinance, 1959, s. 9 (K.).*

### **Editor's Summary**

In November, 1957, the respondent, a money-lender, made a loan of Shs. 60,000/- to the appellant which purported to be secured by an equitable

deposit of title deeds on a certain plot, accompanied by a memorandum of equitable mortgage. The memorandum was not registered, registration not being required under s. 59 of the Land Titles Ordinance until it was amended retrospectively by s. 9 of the Land Titles (Amendment) Ordinance, 1959, which came into force on January 1, 1961. Section 9 of the Land Titles (Amendment) Ordinance provides that the amendment to s. 59 shall be deemed to have come into operation on the date upon which s. 59 came into force, namely, 1910. The respondent (who was the plaintiff in the Supreme Court) claimed payment of the said sum of Shs. 60,000/- with interest and obtained decree on the footing that the equitable deposit of title deeds had created a valid security and that accordingly the Money-lenders Ordinance, by virtue of s. 3 (1) (b) thereof, had no application to the transaction. It appeared, however, that the attention of the Supreme Court had not been drawn to the retrospective effect of the amendment to s. 59, and it was common ground that if the Money-lenders Ordinance applied to the transaction the claim must fail since certain provisions of the Ordinance had not been complied with. The defendant appealed to the Court of Appeal.

**Held –**

- (i) by virtue of s. 9 (2) of the Land Titles (Amendment) Ordinance, 1959, the amendment to s. 59 of the Land Titles Ordinance must be deemed to have been operative at the time of the loan transaction and accordingly the memorandum of equitable mortgage was invalid for want of registration.
- (ii) by virtue of s. 59 of the Land Titles Ordinance (as so amended) the deposit of title deeds did not effectually create a valid mortgage and the purported equitable mortgage therefore was not an effectual security “upon immovable property” for the purposes of s. 3 (1) (b) of the Money-lenders Ordinance with the result that the loan transaction was not exempted from the operation of the latter Ordinance by the provisions of s. 3 (1) (b) thereof.

Appeal allowed.

**Cases referred to in judgment:**

- (1) *Hutchinson v. Jauncy*, [1950] 1 All E.R. 165; [1950] 1 K.B. 574.
- (2) *Buganda Timber Co. Ltd. v. M. K. Mehta*, [1961] E.A. 477 (C.A.).
- (3) *Odendaal and the Official Receiver v. Gray*, [1960] E.A. 263 (C.A.).
- (4) *Shah v. Patel*, [1961] E.A. 397 (C.A.).
- (5) *Batcheller (Robert) & Sons Ltd. v. Batcheller*, [1945] Ch. 169; [1945] 1 All E.R. 522.
- (6) *St. Aubyn (L.M.) v. Attorney-General (No. 2)*, [1951] 2 All E.R. 473.
- (7) *Barclays Bank Ltd. v. Inland Revenue Commissioners*, [1961] A.C. 509; [1960] 2 All E.R. 817.

January 16. The following judgments were read:

**Judgment**

**Crawshaw JA:** This is an appeal against a judgment of the Supreme Court in which it was held that a certain equitable mortgage by deposit of title deeds was valid, and that by virtue of s. 3 (1) (b) of the



Money-lenders Ordinance, Cap. 307 (except where otherwise appears reference to chapters will be to those in the revised laws of 1948), the provisions of that Ordinance did not therefore apply to the money loaned on the security of that mortgage, which money the plaintiff/respondent was therefore entitled to recover from the appellant/defendant. Judgment was accordingly given for the respondent in the sum of Shs. 93,405/-, being the sum of Shs. 60,000/- loaned and interest to a date prior to the institution of the suit, together with subsequent interest and costs.

The facts are not in dispute. Apart from a formal witness called by the court, only one witness was called, and that was Mr. Patel, the secretary of the

respondent company. On November 12, 1957, the respondent made a loan of Shs. 60,000/- to the appellant, both parties carrying on business as money-lenders. The loan was purportedly secured by a deposit of title deeds on a certain plot, number 12, accompanied by a memorandum of deposit. The memorandum was not registered in any registry; the reason given by the respondent for failing to do so was the shortness of the loan, which was to be for three months only. The loan was not repaid during that period, and on February 28, 1958, the respondent, at the request of the appellant, released the title deeds of plot 12 on the appellant depositing in substitution the title deeds of plot 52. No new memorandum was drawn up, but informal amendments were made to the original memorandum, which still remained unregistered. The appellant failed to repay any part of the loan or interest and on November 7, 1960, the respondent filed a suit on the loan (not a mortgage suit), judgment in his favour being given on July 28, 1961.

It is not in dispute that if the Money-lenders Ordinance applied to the transaction, repayment of the loan could not be enforced because certain provisions of that Ordinance had not been complied with. The respondent claimed exemption from that Ordinance, however, under s. 3 (1) (b) which reads as follows:

“3.(1) The provisions of this Ordinance shall not apply:

.....

- (b) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge.”

It was common ground that the land to which the deposited title deeds related came under the Land Titles Ordinance, Cap. 159. The heading to part 2 of that Ordinance reads,

“Registration of documents affecting holdings in respect of which a certificate of ownership shall have been granted.”

Whether it is strictly correct to say that a memorandum of deposit “affects” a “holding” is not material, for express provision is made in s. 59, which comes within that part, for the creation of mortgages by registered instruments. Section 59 as it read at the time of the loan was as follows:

- “59. No lien, charge or mortgage (other than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or other enactment) shall be created or effected so as to be of any legal validity upon or in respect of a holding or interest therein, unless the same be created or effected by a last will, of which probate is registered under this Ordinance, or by the order of a competent court or by a duly executed instrument, such order or instrument being duly registered under this part:

“Provided, however, that nothing in this section shall be deemed to affect the provisions of the Equitable Mortgages Ordinance or the lien of any advocate in respect of taxable costs, charges or expenses incurred by him in connection with the holding or any interest therein,”

Section 2 of the Equitable Mortgages Ordinance, Cap. 152, at the time of the loan read as follows:

- “2. Subject to the provisions hereinafter contained, nothing in s. 59 of the Indian Transfer of Property Act, 1882 (Act IV of 1882), as applied to

the Colony shall be deemed to render invalid mortgages made in the Colony by delivery to a creditor or his agent of a document or documents of title to immovable property, with intent to create a security thereon. Such delivery shall, subject to the provisions of the Crown Lands Ordinance, whether made before or after the date of this Ordinance, have the same effect on the immovable property sought to be charged as a deposit of title deeds in England at the date of this Ordinance.”

The Equitable Mortgages Ordinance was substantially amended by the Equitable Mortgages (Amendment) Ordinance, 1958, which came into force on January 1, 1959, but I do not think it will be necessary to refer thereto except to say that “delivery” was made subject to Ordinances (including the Land Titles Ordinance) in addition to the Crown Lands Ordinance; these amendments were not expressly made retrospective. Section 9 of the Land Titles (Amendment) Ordinance, 1959, No. 24 of 1959, which came into force on January 1, 1961, substituted a new proviso to s. 59; s. 9 reads as follows:

“9.(1) Section 59 of the principal Ordinance is amended by substituting for the proviso thereto a new proviso as follows:

“Provided that nothing in this section:

- (i) shall affect the lien of any advocate in respect of taxable costs, charges or expenses due to or incurred by him in connection with the holding or any interest therein;
  - (ii) shall apply to any equitable mortgage by deposit of documents of title, if a memorandum of such equitable mortgage has been registered in the register. On the discharge of such equitable mortgage a memorandum of such discharge shall be registered in the register. Every memorandum shall be transmitted to the registrar of the area in which the immovable property thereby affected is situate in duplicate and shall be in such form, and there shall be paid on the registration thereof such fee, as may be prescribed.
- (2) Sub-section (1) of this section shall be deemed to have come into operation on the date upon which the said s. 59 came into operation.”

The appellant in his written statement of defence referred to breaches of the Money-lenders Ordinance, and in para. 3 challenged exemption from the Ordinance under s. 3 (1) (b) as follows:

- “3. No loan was ever effected or made in pursuance of or after ‘execution of a charge’ (which was never perfected by registration and evidence whereof is not receivable in any Civil Court without such registration), within the meaning of s. 3 (1) (b) of the Money-lenders Ordinance. No suit is or can accordingly be founded upon a charge, nor are reliefs appropriate to the enforcement of a charge contained in the plaint.”

No reference to the amended proviso to s. 59 was made in the pleadings. In argument before the lower court Mr. Salter for the plaintiff mentioned the fact of there having been an amendment, but it does not appear from the record that the attention of the court was drawn to its retrospective effect. It seems that Mr. Nazareth, who appeared for the defendant, argued the question of registration on the basis of the law as it stood at the time of the loan, as he did before us until his attention was drawn to the amendment and its retrospective effect. The learned judge in his judgment referred to the proviso as it was at the time of the making of the loan which, he said, in his opinion was the material time. It seems certain that at the trial this was also the view of counsel, and that it was not appreciated, at least by Mr. Nazareth and the learned judge, that the

amendment had been made retrospective. In fact it was not until his final address to us that Mr. Nazareth appeared to realise this significant fact.

The first question therefore is whether the amendment to the proviso to s. 59 affects the instant transaction. The Land Titles Ordinance came into existence in 1908. In 1910 the Ordinance was extensively amended, including the addition of a section similar to s. 59 of the Ordinance as it appeared in the revised laws of 1948 (hereinafter referred to as the “1948 Ordinance”), except that the proviso, although substantially the same, was slightly differently worded. It would seem that in the revised laws of 1926 the provision in the proviso relating to an advocate’s lien was retained, but the provision relating to the Equitable Mortgages Ordinance was inadvertently omitted. By the Land Titles (Amendment) Ordinance, 1927 the proviso was therefore amended to read as it subsequently appeared in the 1948 Ordinance. The proviso as amended in 1927 is therefore the proviso for which s. 9 of the 1959 amending Ordinance (hereinafter referred to as the “1959 Ordinance”) introduced a substitution, whereas sub-s. (2) of s. 9 purports to make the substitution effective from 1910. We are not however concerned with what the position might be prior to 1927, and I am satisfied that the 1959 amendment must be deemed to have been operative at the time of the loan transaction with which we are concerned. It may appear hard on a mortgagee who construed the proviso in the 1948 Ordinance as exempting from registration a mortgage by deposit (and I do not think it is necessary for us to decide whether the proviso in the 1948 Ordinance should be so construed), but it may be that the legislature in introducing the amendment in the 1959 Ordinance had construed the proviso in the 1948 Ordinance as not exempting such mortgages from registration, and thought that it was merely clarifying the existing law. In the instant case it would seem that the respondent at least contemplated a possible necessity for registration, for it appears that at first it was only the short period of the loan which was the reason for not registering the memorandum, and after that period had expired and the debt remained unsatisfied, the only reason was the inability of the respondent to obtain from the appellant a certain power of attorney relating to the appellant’s authority to deposit the title deeds to plot 52. There is no doubt, I think, that the lower court, by virtue of the nature of the retrospective provision in the 1959 Ordinance was obliged to apply it, for at the time of its coming into force in January, 1961, the judgment of the court had not been delivered. Section 23 (3) (c) of the Interpretation and General Provisions Ordinance, 1956, reads:

“(3) Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not –

.....

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;”

The “contrary intention” appears in the retroactive provision of s. 9 (2) of the 1959 Ordinance. I am not quite sure whether Mr. Salter wished us to hold that if we came to the conclusion that the material time to apply the law was not the date of the loan, then it was the filing of the suit. I have given consideration to this, and quote the following extract from the judgment of Evershed, M.R., in *Hutchinson v. Jauncey* (1), [1950] 1 K.B. 574 at p. 578:

“To quote from Maxwell, on *The Interpretation of Statutes* (9th Edn.), p. 229: ‘In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.’ Two of the cases seem to indicate that there should be found express reference to causes of action pending. For example, in *In re Joseph Suche & Co., Ltd.*, 1 Ch. D. 48, 50, Jessel, M.R.,

sitting at first instance decided a particular case on this ground of principle. He stated his conclusion thus: 'I so decide because it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.' Something of the same kind, I think, may fairly be said to emerge from the language of Wilde, B., in *Wright v. Hale* (1860), 30 L.J. Ex. 40, 43. Having examined the many cases cited for the landlord, I doubt whether the principle ought to be expressed in quite such precise language as Jessel, M.R., used in *In re Joseph Suche & Co., Ltd.* In other words, it seems to me that, if the necessary intendment of the Act is to affect pending causes of action, then this court will give effect to the intention of the legislature even though there is no express reference to pending actions."

The above quoted extract from Maxwell is also to be found in the 11th Edn., where reference is made to the *Hutchinson* case (1), without comment. The language of sub-s. (2) of s. 9 of the 1959 Ordinance is, in my opinion, unequivocal and leaves no room for doubt that after its introduction any decision of the court must be based on the understanding that at the time the action was brought the proviso in the 1959 Ordinance must be deemed to have been in force.

Mr. Salter, with our permission, filed a notice of cross-appeal during the hearing of the appeal. In it he contended that the decision of the learned judge ought to be affirmed on grounds other than those relied on by the judge. He submitted that even if it is held that the proviso as amended in the 1959 Ordinance applied, and registration of the memorandum of deposit was necessary, that only affects the security, and the transaction being bona fide, it still comes within the exemption under s. 3 (1) (b) of the Money-lenders Ordinance. It is not necessary, he says, for the security to be enforced and that provided it is a bona fide transaction deposit of title deeds alone is sufficient. He referred to a letter of November 12, 1957, from the appellant to the respondent in which the appellant confirmed the terms of the transaction, including the giving of security, and Mr. Salter submitted that the respondent would have been able to obtain specific performance of a legal mortgage. In the *Buganda Timber Co. Ltd. v. M. K. Mehta* (2), [1961] E.A. 477, (C.A.) to which we were referred, at p. 479 D Sir Kenneth O'Connor, then President of this court, in a judgment with which the other members of the court concurred, said of s. 22 (1) (c) of the Uganda Money-lenders Ordinance (the section is similar in all material respects to the Kenya s. 3 (1) (b)):

"The words 'where the security . . . is effected' point, in my opinion, to a mortgage or charge which effectually creates a security and not to some instrument which requires the execution of another instrument to make it effectual or to an instrument, whether it be a mortgage or charge, which is ineffectual as a security by reason of being unregistered."

However one construes the provisions of the Equitable Mortgages Ordinance, as it originally read or as amended, the deposit of title deeds in the instant case did not effectually create a mortgage, because s. 59 of the 1948 Ordinance (which, having been introduced in 1910 was, incidentally, later in date than the Equitable Mortgages Ordinance which was introduced in 1909) specifically says that, "No lien, charge or mortgage" shall have "any legal validity upon or in respect of a holding or interest therein" unless created by a duly executed and registered instrument. The mortgage therefore is not an effectual security "upon immovable property" for the purposes of s. 3 (1) (b) of the Moneylenders Ordinance.

Mr. Salter commented on the difficulty in construing in s. 3 (1) (b) of the Money-lenders Ordinance the words

“or of any bona fide transaction of money-lending upon such mortgage or charge”.

He suggested that the word “of” should perhaps be read as “to”. Even if the last part of the paragraph can be read as distinct from the remainder of the paragraph to the extent of meaning,

“The provisions of this Ordinance shall not apply – to any bona fide transaction of money-lending upon such mortgage or charge”,

there are still the words “upon such mortgage or charge”. The latter must, in my opinion, relate to an effectual mortgage or charge, and for the reasons I have given the mortgage in the instant case was not effectual itself to create any security. Sub-section (1), in my opinion, is clearly based on the giving of security, and not merely on a right to obtain a mortgage. Reference was made by counsel to *Odendaal and the Official Receiver v. Gray* (3), [1960] E.A. 263, (C.A.) but that decision was prior to the coming into force of the 1959 Ordinance and I do not think it helps us. We have also been referred to *Shah v. Patel* (4), [1961] E.A. 397, [C.A.] but it is not really relevant as it relates to a further loan on a security previously created to secure an earlier loan.

A further submission made by Mr. Salter on his cross-appeal is that the failure of the respondent to register was not his fault, but the fault of the appellant who, although requested to do so, failed to hand to the respondent the power of attorney to which I have already referred, and which Mr. Salter suggests would have been necessary in order to obtain registration of the memorandum; he says that the appellant cannot now benefit from his own default. Apart, however, from the express provisions of s. 3 (1) (b), the respondent has, in my opinion, himself been largely to blame for not having registered the memorandum had he (as he apparently did) thought it necessary or desirable to do so. He could have held up the loan until the day of registration. Up to the time that title deeds of plot 52 were substituted for those to plot 12, he could have registered the memorandum had he seen fit, although I am not deciding (and in the circumstances it is not in my opinion necessary to do so) whether exemption under s. 3 (1) (b) would be obtained by registration subsequent to the loan. He could have refused to return the deeds of plot 12 until the fresh memorandum of deposit of deeds of plot 52 had been prepared and registered, such deposit to include the power of attorney. The burden is on the respondent to prove that the transaction came within the exemption provided by s. 3 (1) (b), and had the learned judge appreciated the retrospective effect of sub-s. (2) of the 1959 Ordinance he must, in my opinion, have come to the conclusion that the respondent had failed to discharge that burden.

In my opinion the appeal must be allowed with costs to the appellant in the court below. I come to this conclusion with some reluctance, for the appellant, himself a money-lender, is relying on an error of procedure to avoid paying a debt. I would make no order as to the costs of this appeal, for had the appellant argued his case in the lower court as it was eventually argued before us, and drawn the attention of the learned judge to the 1959 Ordinance and its retrospective effect, it seems most probable that the learned judge would have come to a conclusion different to that which he did, and that no appeal by the appellant would have been necessary. I would order that the cross-appeal be dismissed with costs.

**Sir Ronald Sinclair P:** I have had the advantage of reading the judgments prepared by the learned Acting Vice-President and Crawshaw, J.A. I agree with them and have nothing to add. The appeal is accordingly allowed, the judgment and decree of the Supreme Court are set aside and it is

ordered that judgment be entered for the appellant with costs. There will be no order as to the costs of the appeal. The cross-appeal is dismissed with costs.

**Sir Trevor Gould Ag V-P:** I have had the advantage of reading the judgment of Crawshaw, J.A., with which I agree. I am satisfied that the proviso to s. 59 of the Land Titles Ordinance (Cap. 159) as enacted by s. 9 of the Land Titles (Amendment) Ordinance, 1959, which came into operation on January 1, 1961, is deliberately and expressly made retrospective. Sub-section (2) of s. 9 enacts that sub-s. (1), which substitutes the new proviso for the old, shall “be deemed” to have come into operation at a date prior to the making of the purported equitable mortgage in issue in this appeal. The word “deemed” has been considered in a number of cases in recent years (*Batcheller (Robert) & Sons Ltd. v. Batcheller* (5), [1945] Ch. 169 at 176; *St. Aubyn (L.M.) v. Attorney-General (No. 2)* (6), [1951] 2 All E.R. 473 at 498; *Barclays Bank Ltd. v. Inland Revenue Commissioners* (7), [1961] A.C. 509 at 523) but I find nothing in what was said in those cases to justify any other effect being given to the word in the context of s. 9 of the Land Titles (Amendment) Ordinance, 1959, than that the principal Ordinance must be conclusively presumed to have contained the new proviso from the date upon which s. 59 came into operation. That being so neither s. 23 (3) (c) (dealing with rights accrued before the repeal of the enactment) nor s. 23 (3) (e) (dealing with legal proceedings in respect of such rights) of the Interpretation and General Provisions Ordinance, 1956, can avail the respondent, for those sub-sections are subject to the words “unless a contrary intention appears”. Nor do I think that the respondent can rely upon the fact that, at the date of the purported equitable mortgage, s. 2 of the Equitable Mortgages Ordinance was not expressed to be subject to the Land Titles Ordinance, though it was amended to that effect at a later date. At the date of the purported mortgage s. 59 of the Land Titles Ordinance must be regarded as having contained a proviso, under the terms of which an equitable mortgage by deposit of title deeds of land subject to the Ordinance, would be valid only if a memorandum thereof was registered. That provision is specific with regard to land subject to the Land Titles Ordinance and could not be regarded as repealed by the general provisions of the Equitable Mortgages Ordinance.

Concerning the question raised on the cross-appeal as to the effect of the concluding words of s. 3 (1) (b) of the Money-lenders Ordinance (Cap. 307) I have nothing to add to what has been said in his judgment by the learned Justice of Appeal.

*Appeal allowed.*

For the appellant:

*JM Nazareth QC and TR Johar*  
*Winayak, Johar & Co., Nairobi*

For the respondent:

*CW Salter QC and SC Gautama*  
*Satish Gautama, Nairobi*

**Partington v Partington**  
[1963] 1 EA 77 (HCT)

**Division:**

High Court of Tanganyika at Dar-Es-Salaam



**Date of judgment:** 23 January 1963

**Case Number:** 7/1962

**Before:** Biron J

**Sourced by:** LawAfrica

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[1] *Divorce – Jurisdiction – Petition for divorce under the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950 – Whether the Acts apply in Tanganyika after attainment of the status of a republic – Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950 – Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962, (Constitutional Act No. 2), s. 4 and s. 5 (T.) – Republican Constitution, (Constitutional Act No. 1), (T.).*

[2] *Divorce – Jurisdiction – Petition for dissolution of marriage – Nature of residence to found jurisdiction – Indian and Colonial (Divorce Jurisdiction) Act, 1926, s. 1.*

### **Editor’s Summary**

The petitioner filed a petition on August 23, 1962, under the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, praying for the dissolution of the marriage with her husband. The petition was undefended. At the hearing two preliminary points were raised, namely (a) whether in view of the attainment on December 9, 1962, by the territory of the status of a sovereign republic and the consequential legislation to give effect to the constitutional changes, the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, still continued to apply; and (b) whether the petitioner was “resident” in the territory within the meaning of s. 1 (1) (c) of the Indian and Colonial (Divorce Jurisdiction) Act, 1926. In an affidavit as to residence, which she filed on the direction of the court, the petitioner stated that she resigned her employment in Kenya in August, 1962, and came to Dar-es-Salaam intending to stay there and also to file a second petition for divorce; that when she came to Dar-es-Salaam she did so with the intention of abandoning any residence she might have had in Kenya; that it was her intention to take up residence in Tanganyika indefinitely and not merely to stay in Dar-es-Salaam until she obtained her decree of dissolution of marriage. She further stated that her intentions were indeterminate and depended on whether she found suitable employment and suitable accommodation, and referring to a letter written by the opposing advocates to the court, she stated *inter alia*, that “it is only as a result of the lack of accommodation that I might be obliged to leave Tanganyika”.

### **Held –**

- (i) the applicability of the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, has not been affected by the Territory having become a sovereign republic and further, that even if any changes in the Acts or their applicability had in fact been brought about by the constitutional changes, the petition, which was filed on August 23, 1962, would be saved by the provisions of s. 10 (1) of the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962 (Constitutional Act No. 2).
- (ii) it was for the petitioner to satisfy the court that she resided in Tanganyika at the time of presenting the petition but there was no indication in the affidavit to show what the position was.



- (iii) such resident need not be permanent, nor need there even be an intention to reside permanently, but the court was not satisfied that her indeterminate intention as to residence was sufficient under the Act to found jurisdiction; therefore,

(iv) the court had no jurisdiction to hear and determine the petition on its merits.

Petition dismissed.

### Cases referred to in judgment:

- (1) *Partington v. Partington*, [1962] E.A. 579 (T.); [1962] E.A. 582 (T.).
- (2) *Matalon v. Matalon*, [1952] P. 233; [1952] 1 All E.R. 1025.
- (3) *Keserue v. Keserue*, [1962] 3 All E.R. 796.
- (4) *Armytage v. Armytage*, [1898] P. 178.
- (5) *Flowers v. Flowers* (1910), 32 All. 203.
- (6) *In re Bowie* (1880), 16 Ch.D. 484.

### Judgment

**Biron J:** This is the second petition brought by the petitioner under the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, praying for the dissolution of the marriage with her husband, the respondent. As at the first petition the suit is undefended, and likewise as at the first petition two preliminary points, both in respect of jurisdiction, fall to be determined before the petition can proceed to be heard on its merits.

The first question is of general application and is whether, on the attainment on December 9, 1962, by the Territory of the status of a sovereign republic and the consequential legislation to give effect to the constitutional changes, the Acts still continue to apply to this Territory. The corresponding point for decision on the first petition was whether the Acts applied after the Territory had attained independence on December 9, 1961. This point was dealt with by Sir Ralph Windham, C.J., who in his judgment (in *Partington v. Partington* (1), [1962] E.A. 579 (T.)) comprehensively and exhaustively reviewed the whole field of relevant legislation and authority and ruled that the applicability of the Acts was not affected by the Territory having attained its independence or by the relevant constitutional legislation consequent on such attainment. With respect, I am fully in accord with the conclusion of the learned Chief Justice that the Acts still applied after the attainment of independence, that is, in effect, until December 8, 1962. The question now, is whether they still continue to apply after December 9, 1962, when the Territory became a sovereign republic.

As agreed by both Mr. Fraser Murray who appeared for the petitioner, and by the learned solicitor-general in his capacity as Proctor of the Republic, to whom for his assistance as *amicus curiae* the court is indebted, the only relevant legislation is to be found in the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962 (Constitutional Act No. 2), to be read as one with the Republican Constitution (Constitutional Act No. 1), which came into operation on December 9, 1962. Section 4 of the Act repealed certain Acts specified in the First Schedule, which repeal, however, does not affect this case. The section to the point is s. 5, which reads:

- “5.(1) Without prejudice to the repeal or revocation of any existing law with effect from the date on which this Act comes into operation, the existing law shall continue to be the law of Tanganyika after the commencement of the Republican Constitution, except in so far as it is thereafter amended, modified, repealed or revoked by competent authority or any provision thereof expires, but shall be construed

with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it into conformity with the provisions of the Republican Constitution or as are provided in this Act; and for the avoidance of doubts it is hereby

declared that, subject as aforesaid and to other provisions of this Act, the operation of the existing law after the commencement of the Republican Constitution shall not be affected by the repeal or revocation of the laws specified in Part I of the First Schedule to this Act, or by Tanganyika becoming a Republic.

- “(2) The president may, at any time before the ninth day of June, 1963, by order published in the *Gazette*, make such amendments to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Republican Constitution or otherwise for giving effect or enabling effect to be given to those provisions, and where the president makes an order under this section in relation to an Act of the Common Services Organization, that order shall have effect so as to amend that law in and in relation to any person or matter connected with Tanganyika, notwithstanding any provision to the contrary in the Interpretation and General Clauses Ordinance.”

The Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, have not in fact been either repealed, modified or amended, nor has the president, as empowered by sub-s. (2) of s. 5 above quoted, made any amendments to these Acts, though it is submitted by the learned solicitor-general that these enabling powers in sub-s. (2) are not intended to embrace substantive changes in the law. In any event this last is purely academic, as the president has not in fact exercised his powers under the sub-section to date. As in the case of the attainment by the Territory of independence, the applicability of the Acts in question has not been affected by the Territory having become a sovereign republic. Further, as submitted by learned counsel for the petitioner, even if any changes in the Acts or their applicability had in fact been brought about by the constitutional changes, this instant petition, which was filed on August 23, 1962, would be saved by the provisions of s. 10 (1) of the Act, which reads:

- “10. (1) Any proceeding pending immediately before the commencement of the Republican Constitution before the High Court established by the existing constitution may be continued and concluded, and decrees, judgments and orders therein given and perfected, after such commencement before and by the High Court established by the Republican Constitution.”

The second point for determination is the issue of residence. By sub-s. (1) (c) of s. 1 of the principal Act, the Indian and Colonial (Divorce Jurisdiction) Act, 1926, which Act as applied confers jurisdiction on the High Court of Tanganyika in divorce proceedings between parties domiciled in England or Scotland:

“no such court shall grant any relief under this Act except in such cases where the petitioner resided in (India) Tanganyika at the time of presenting the petition and the place where the parties to the marriage last resided together was in (India) Tanganyika, or make any decree of dissolution of marriage on the ground of adultery, cruelty or any crime except where the marriage was solemnized in (India) Tanganyika or the adultery, cruelty, or crime complained of was committed in (India) Tanganyika.”

The immediate and only question with which the court is at present concerned is whether “the petitioner resided in Tanganyika at the time of presenting the petition” within the meaning of the Act. Like the first preliminary point, this second question also arose on the first petition brought, and was considered and dealt with by my brother Mosdell in a judgment reported in the same volume of the Eastern Africa Law Reports at p. 582. The learned judge ruled – and I quote from the headnote:

**“Held:**

- (i) the residence of the petitioner for a fortnight was too casual to be termed ‘residence’ within the meaning of s. 1 (1) *ibid*.

- (ii) it was not the intention of the legislative authority to enable a spouse residing in a territory in East Africa to go casually to an adjoining territory for a short period, in order that such a spouse might take advantage of the appropriate legislation operative therein.
- (iii) the court had no jurisdiction to hear the petition.

Petition dismissed.”

I must say at once that the position prevailing at the presentation of the first petition can easily be distinguished on the facts from that pertaining at the presentation of this instant petition. At the time the petitioner presented her first petition she was living in Kenya, and whilst on a short casual visit to this Territory she presented her petition. The present position as deposed to by the petitioner in her affidavit filed on January 11, 1963, is – and I think that the affidavit should be set out in full, as follows:

“I, Mary Margaret Partington, Christian, make oath and say as follows:

- “1. I am the petitioner in this matter, and make this affidavit by reason of the direction of Mr. Justice Biron made on December 31, 1962. After my husband and I parted in Moshi in March, 1960, I went to Kenya and lived in Nairobi until December, 1960. During that period I worked as a secretary with the Australian Trade Commission and had a flat of my own in Nairobi.
2. In 1960 I gave up this employment and also the flat and went to Nyeri to work as secretary at the Outspan Hotel, living in the hotel. Apart from a visit of twelve days to Dar-es-Salaam in November, 1961, I stayed at Nyeri, and also retained this employment, until August, 1962.
- “3. In August, 1962, I resigned my employment at Nyeri and came to Dar-es-Salaam intending to stay here, and intending also to file a second petition for divorce, the first petition having been dismissed on the grounds that the twelve days’ stay above referred to was not sufficient to give the court jurisdiction.
4. When I resigned my job in Nyeri and came to Dar-es-Salaam I did so with the intention of abandoning any residence I might have had in Kenya and it was my intention to take up residence in Tanganyika indefinitely. It was not my intention merely to stay here until I might obtain a decree of dissolution of marriage. My intentions were entirely indeterminate, and it depended on whether I found suitable employment and suitable accommodation.
- “5. I was successful in obtaining reasonable employment as a secretary in the Dar-es-Salaam Club. Unfortunately I have been unable, despite continuous efforts, to find suitable accommodation, and have been obliged to stay with friends during the whole of my stay here. This was not of my own choosing or preference, and if I had been able to obtain a flat I would have established a home of my own here.
- “6. This is still my position and if I am successful in my efforts, which continue, to obtain accommodation I would stay here indefinitely. By this I do not mean that I might not leave Tanganyika within the next year or two or perhaps, depending on circumstances, earlier but it is not the case that I would leave Tanganyika immediately after obtaining a decree, if the court thought fit to grant my petition. It is not my intention to go back at once to the United Kingdom or to Kenya. I have no residence in either of these places and indeed have no ties anywhere apart from a few friends. I have in fact no fixed or settled intention as regards the future, and as

stated above, if I can find suitable accommodation in Dar-es-Salaam, I might very well stay here for some time perhaps a year or more.

- “7. I refer to the second paragraph of my advocates’ letter of December 24. This was written as a result of a misunderstanding. It is true that I find the lack of accommodation, and having to stay with friends extremely difficult. At the time when the letter was written I saw little prospect of being able to obtain accommodation but it is only as a result of the lack of accommodation that I might be obliged to leave Tanganyika.”

The letter referred to in the affidavit is from the petitioner’s advocates and is addressed to the registrar of the court. The second paragraph specifically referred to reads:

“It is respectfully requested that consideration be given to the hearing of this matter during the vacation as a matter of urgency. The petitioner is a lady of very limited means who is staying in Dar-es-Salaam for the sole purpose of having this suit determined. She is extremely anxious to go to the United Kingdom without delay, since she is unable to support herself financially here on the small salary she receives by working in the Dar-es-Salaam Club.”

Consequent on this request by the petitioner’s advocates, the matter first came before me in chambers when an application was made to have the petition proved by affidavit evidence. It was then that an order was made regarding the lodging of an affidavit as to residence.

In his ruling Mosdell, J., dwelt at considerable length on the dictionary definitions of “residence” and the numerous and varied meanings ascribed to it in decided cases. He exhaustively examined the many cases cited before him, remarking *inter alia* (at p. 584):

“The word ‘residence’ had been judicially defined in different ways. In Stroud’s Judicial Dictionary (3rd Edn.), Vol. 3, p. 2569 et seq., there are no less than fifty-nine instances showing how the word ‘residence’ has been construed in different contexts, and a perusal of them shows that in accordance with item (3) under the heading ‘Reside; Residence; Resident’ at p. 2569, op. cit.:

‘ “Residence” has a variety of meanings according to the statute (or document) in which it is used (per Erle, C.J., *Naef v. Mutter*, 31 L.J. C.P. 359). It is an “ambiguous word” and may receive a different meaning according to the position in which it is found (per Cotton, L.J., *Re Bowie, Ex parte Breull*, 16 Ch.D. 484).’

“Mr. Thornton for the petitioner ran through a whole gamut of contexts in which the meaning of the word ‘residence’ had been dealt with starting with bankruptcy, proceeding through bastardy and ending up with decrees of judicial separation and nullity in matrimonial matters.”

In his argument before me Mr. Fraser Murray referred to cases cited and dealt with at the previous hearing, relying in particular on that of *Matalon v. Matalon* (2), [1952] P. 233, where it was held that a residence of about four months was sufficient to found jurisdiction in the court in England. To that it is perhaps not without interest to note that in the recent case of *Keserue v. Keserue* (3), [1962] 3 All E.R. 796, residence of even less than a month was held sufficient to found jurisdiction. I have been unable to find any report of this case, but it is summarised in the notes of latest cases in the October (1962) number of Current Law, para. 296. Both *Matalon v. Matalon* (2) and *Keserue v. Keserue* (3) were proceedings for judicial separation which, as conceded by learned counsel for the petitioner, is not of great persuasive authority on the issue of

jurisdiction in divorce proceedings as in this instant case. If any support for this were necessary it is to be found in the judgment of Gorell Barnes, J., in *Armytage v. Armytage* (4), [1898] P. 178, quoting from Dr. Fraser in his Treatise on Husband and Wife:

“ ‘different considerations come into play when the object is not permanently to affect the status of parties, but to obtain immediate protection from cruel treatment, or the means of daily subsistence’, and the hardship which would arise if the rule were established that ‘jurisdiction in actions of separation only exists in the forum of the husband’s domicile’ ”.

Apart from the fact that all the relevant authorities were fully and exhaustively examined and considered by Mosdell, J., thus rendering it otiose for me to repeat the forensic exercise, I fail to find any authority cited so to the point as to be able to say that this decision should be followed. Nor, to my mind, can even a general principle as to what should constitute residence be derived from the authorities which would be applicable to this instant case. No authority has been cited, nor am I aware of any, in respect of the construction of “resident” in the particular Act under review. The case of *Flowers v. Flowers* (5) (1910), 32 All. 203, cited at the earlier hearing, although concerned with residence in India of parties domiciled in England, is of no assistance, as it dealt with jurisdiction founded on temporary residence in one district in India as opposed to more permanent residence in another district, also in India. Apart from that, the position there was governed by the Indian Divorce Act of 1869, which was long before English law adopted domicile as the basis of jurisdiction in divorce matters subsequently invested with statutory authority. As stated by James, L.J., in *In re Bowie* (6) (1880), 16 Ch.D. 484 at 486:

“There are cases in which it has been judicially decided, and I think rightly, that the words ‘residence’ and ‘business’ have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur.”

This dictum was quoted with approval by Hodson, L.J., in *Matalon v. Matalon* (2). It is therefore necessary to ask, in the language of the learned lord justice, what is the object and intent of the Act in granting jurisdiction to the courts in India and to the other countries to which the Act has been applied, thus constituting a departure from the general rule that jurisdiction in divorce matters is founded on domicile? The answer is, I consider, to be found in the Act itself, sub-s. (1) (d) of s. 1 of which reads:

“any such court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause, he or she is prevented from taking proceedings in the court of the country in which he or she is domiciled, and the court shall so refuse if it is not satisfied that in the interests of justice it is desirable that the suit should be determined in (India) Tanganyika.”

To my mind, it is abundantly clear from the Act itself that its object and intent was to provide an auxiliary forum to the principal one of their domicile for expatriates resident in India or in the colonies.

I lack the temerity to attempt even a general definition as to what would constitute residence within the meaning of the Act. But I am satisfied that it must, in the words of Hodson, L.J., in *Matalon v. Matalon* (2), in ‘extent and quality’ be a sufficiently real and substantive residence to justify the court conceding the relief afforded by the Act in assuming, what for want of a better expression, I have termed this auxiliary jurisdiction. Although it is, I think, impossible to lay down a precise definition of such residence, nor as indicated,

would I even attempt one, I have not the slightest hesitation in declaring that on the position as to residence as disclosed in the letter from the petitioner's advocates to the court, referred to above, no court could possibly consider such residence sufficient to found jurisdiction in this court. If the letter were accepted as indicating the true position, it would in effect mean that the petitioner, having given up her residence in Kenya, while as it were, in transit on her way home to England, came to this Territory in order to file her petition. Owing to her straitened means she cannot, however, afford to stay here longer and therefore requests the court as a matter of urgency to deal with her petition during the court vacation in order to enable her to continue her journey to England, where lies her principal and I would add, proper, forum, based on domicile, as expeditiously as possible. It is, however, submitted that the position as indicated in the letter is not the true position, that it was written as the result of a misunderstanding and that the true position is as set out in the affidavit. Mr. Fraser Murray, who wrote the letter, stated from the bar that he had misunderstood his client's instructions and he accepted full responsibility for the mistake. The statement in the letter is certainly at variance with the averment in the petition at para. 11, which reads:

"The petitioner is at present employed as a secretary at a salary of approximately £57 per month and by reason of her limited means is not able to go to the United Kingdom for the purpose of instituting proceedings there, without suffering considerable financial hardship. For this reason she claims that it is in the interests of justice that the suit be determined in Tanganyika."

This paragraph is similar to the corresponding paragraph in the first petition, which, incidentally, bears Mr. Fraser Murray's signature. The second petition, by the way, does not bear counsel's signature, thus not conforming to established practice if not actually offending s. 44 (2) of the Advocates Ordinance (Cap. 341 Revised Laws) as well.

By her affidavit the petitioner is expressly clearing up and correcting the misunderstanding which has arisen as a result of her advocate's letter. According to this letter

"She is extremely anxious to go to the United Kingdom without delay, since she is unable to support herself financially here on the small salary she receives by working in the Dar-es-Salaam Club".

In her affidavit referring to the letter, she states:

"This was written as a result of a misunderstanding. It is true that I find the lack of accommodation, and having to stay with friends extremely difficult. At the time when the letter was written I saw little prospect of being able to obtain accommodation but it is only as a result of the lack of accommodation that I might be obliged to leave Tanganyika."

There is no mention of, or reference to, her financial position.

The material time at which the residence must qualify for founding jurisdiction is at the presentation – the filing of the petition, in this instant case August 23, 1962. There is, however, no indication as to what the position was at the time the petitioner filed her petition, nor, as already noted, is there even any reference to her financial position.

It is, I consider, on the petitioner to satisfy the court that she "resided in Tanganyika" at the time of presenting the petition within the meaning of the Act. Whilst I fully agree with learned counsel that such residence need not be permanent, nor need there even be an intention to reside permanently, on due



consideration of all the material before the court, I am not satisfied that this indeterminate – to borrow the petitioner’s expression with reference to her intention, residence, is sufficient under the Act to found jurisdiction in this court.

Perhaps I ought to make it clear that in considering and construing “resident” in the Act I am not taking into account any question of hardship in respect of which the court must be satisfied in accordance with s. 1 (1) (d) above quoted, which, I consider, is an entirely separate issue beyond the purview of the court in these proceedings on the determination of the issue of jurisdiction. This other issue may well, in the circumstances, have proved the more formidable hurdle had this instant one been surmounted.

For the reasons set out, I find myself constrained to hold that the court has no jurisdiction to hear and determine the petition on its merits, and order accordingly.

*Petition dismissed.*

For the petitioner:

*WD Fraser Murray*

*Fraser Murray Thornton & Co., Dar-es-Salaam*

The respondent did not appear and was not represented.

For Proctor of the Republic:

*AM Troup* (State Attorney, Tanganyika)

*The Attorney-General, Tanganyika*

**Cowasjee Dinshaw & Bros (Aden) v Cowasjee  
Dinshaw Employees’ Union**  
[1963] 1 EA 84 (CAA)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Aden                                       |
| <b>Date of judgment:</b> | 22 February 1963  |
| <b>Case Number:</b>      | 98/1962   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | Supreme Court of Aden – Le Gallais, C.J.                      |

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*[1] Practice – Industrial dispute – Trade union – Natural justice – Remark by president of industrial court against employer at opening of the hearing – Failure by labour officer to give copy of report to employer before hearing – Report forwarded to industrial court – Allegation that award of industrial*

*court in excess of jurisdiction – Industrial Relations (Conciliation and Arbitration) Ordinance, 1960, s. 10 and s. 14 (A.).*

*[2] Trade union – Industrial dispute – Natural justice – Remarks by president of industrial court against employer at opening of the hearing – Failure by labour officer to give copy of report to employer before hearing – Report forwarded to industrial court – Allegation that award of industrial court in excess of jurisdiction – Industrial Relations (Conciliation and Arbitration) Ordinance, 1960, s. 10 and s. 14 (A.).*

### **Editor's Summary**

Certain differences had arisen between the appellant, an employer, and the respondent a trade union representing certain workmen employed by the appellant. As no agreement was reached, the respondent reported a trade dispute to the labour officer in accordance with s. 10 of the Industrial Relations (Conciliation and Arbitration) Ordinance, 1960. Conciliation proceedings having failed, the labour officer made a report to the industrial court in accordance with s. 14 *ibid*. The appellant and the respondent were then heard by the industrial court, and at the opening of the hearing, the president of the industrial court stated that the employer “had failed to negotiate or attempt to negotiate in good faith a settlement of the dispute” and that in these circumstances the industrial court had certain powers which it did not propose to exercise in this

case. Prior to the hearing the appellant had written to the industrial court asking for a copy of the labour officer's report, together with particulars and information given, under s. 14 of the Ordinance and for it to be represented by an advocate before the industrial court, but these requests were refused. The award as issued was stated to apply not only to the employees who were members of the respondent, but also to those "eligible to be members thereof", and provided, *inter alia*, for a wage increase retrospectively and that it (the award) should be effective for two years. The employer appealed to the Supreme Court seeking to have the entire award set aside but the Supreme Court set aside only certain provisions of the award, whereupon the employer appealed to the Court of Appeal again seeking to set aside the award in its entirety. It was contended on behalf of the appellant that the award was bad in law in that the industrial court had offended against the principles of natural justice in refusing to give to the appellant a copy of the labour officer's report and by reason of the president's remarks in creating in the appellant a suspicion that it would not receive a fair hearing, and it was further contended that r. 8 of the Industrial Courts Rules, 1960, which gave the court the power to refuse to allow a party before the industrial court to be represented by an advocate, was ultra vires, that such a refusal was a fundamental breach of the rights of the employer, and that the award was made in excess of jurisdiction and was bad.

**Held –**

- (i) having regard to the functions of the industrial court and the provisions of the Ordinance, the refusal to provide the appellant with a copy of the labour officer's report constituted a failure of natural justice.
- (ii) it was not possible in this case to rely upon the maxim omnia praesumuntur rite esse acta as from the report itself it was apparent either that the industrial court had exceeded its jurisdiction or that it had failed to order all the parties to the dispute to attend before it.
- (iii) the opening remarks of the president were such that they might well imply the existence in the report of matter prejudicial to the appellant and this also constituted a failure of natural justice.

**Obiter –**

- (a) rule 8 of the Industrial Courts Rules, 1960, was not ultra vires, nor was the refusal to allow the appellant to be represented by an advocate a fundamental breach of the rights of the appellant;
- (b) in making the wages increase retrospective and at the same time making the award have effect for two years prospectively the industrial court had exceeded its jurisdiction;
- (c) if any uncertainty existed in an award the proper course was not to appeal to the courts of law *instanter* but to apply to the industrial court itself to remove the ambiguity or uncertainty under s. 20 of the Ordinance.

Appeal allowed. Judgment and order of the Supreme Court set aside.

**Cases referred to in judgment:**

- (1) *H. C. de Souza v. Tanga Town Council*, [1961] E.A. 377 (C.A.).
- (2) *Annamunthodo v. Oilfields Workers' Trade Union*, [1961] A.C. 945, [1961] 3 All E.R. 621.
- (3) *University of Ceylon v. Fernando*, [1960] 1 All E.R. 631.
- (4) *Johnson & Co. (Builders) Ltd. v. Minister of Health*, [1947] 2 All E.R. 395.

(5) *Cowasjee Dinshaw & Bros. Aden Ltd. v. Cowasjee's Staff Association*, [1961] E.A. 436 (C.A.).

February 22. The following judgments were read:

### **Judgment**

**Newbold JA:** On February 21, 1962, the industrial court of Aden made an award in relation to a trade dispute between the appellant, who was the employer, and the respondent, which was a trade union, the trade dispute having been reported to the industrial court in accordance with the provisions of s. 14 of the Industrial Relations (Conciliation and Arbitration) Ordinance, 1960 (hereinafter referred to as the “Ordinance”). From this award the employer appealed to the Supreme Court, which court set aside certain of the provisions of the award. From the decision of the Supreme Court the employer has appealed to this court seeking primarily to set aside the award of the industrial court in its entirety. Under s. 19 of the Ordinance an appeal against an award of the industrial court lies only on a point of law.

The essential facts upon which the employer seeks to set aside the award on points of law are as follows. Differences had arisen between the union, of which a certain number, but by no means all, of the employer’s workmen were members, and the employer in respect of the conditions of service of certain categories of employees. These differences included, *inter alia*, matters relating to end of service benefits, wage increases, housing allowances and leave travel allowances. The union was registered in December, 1961, and prior to that the employer, either directly or in conjunction with a federation of employers, had been negotiating with a different union. I mention this fact as it may have affected the attitude of all persons concerned with this dispute up to the time of the award, and there was some suggestion that the union should not have been a party to the dispute. As no agreement was reached between the union and the employer on the matters specified, on January 10, 1962, the union reported a trade dispute to the labour officer in accordance with s. 10 of the Ordinance. Conciliation proceedings having failed to achieve a settlement on the matters specified, the labour officer made a report to the industrial court on February 2, 1962, in accordance with s. 14 of the Ordinance. The union and the employer were heard by the industrial court on February 15 and 16. At the opening of the hearings the president of the industrial court stated that the employer

“had failed to negotiate or attempt to negotiate in good faith a settlement of the dispute”

and that in these circumstances the industrial court had certain powers which, however, it did not propose to exercise in this case. Prior to the hearings the employer had written asking for a copy of the labour officer’s report, together with any particulars and information given, under s. 14 of the Ordinance and for the employer to be represented by an advocate before the industrial court. These requests had been refused by the industrial court. The award was issued on February 21, 1962, and was stated to apply not only to the relevant categories of employees who were members of the union but also to those “eligible to be members thereof”. The award also stated that it was binding on the successors of the union and the employer and that it was to continue in force for two years from February 21, 1962. As regards the claim for end of service benefits, the award granted both gratuities and supplementary gratuities to employees who qualified in accordance with the conditions set out and provided that

“where the employee is dismissed for serious misconduct or grave neglect of duty, the amount of the gratuity shall be reduced appropriately in relation to the gravity of the offence”.

As regard the claim for a wage increase, the award granted specified increases with effect from January 1, 1961. As regards the claims for housing allowances

and leave travel allowances, the award granted specified housing and leave travel allowances.

From this award the employer appealed to the Supreme Court, Aden, on points of law submitting that the award as a whole was bad on a number of grounds. The Chief Justice held that while there were certain unsatisfactory features, the award as a whole was not bad though certain parts of the award were ordered to be set aside. As I have already stated, the employer has appealed to this court seeking primarily to set aside the award in its entirety.

Mr. Nazareth, who appeared for the employer, submitted that the award was bad in law in its entirety on the following main grounds: first, that the industrial court had offended against the principles of natural justice in refusing to give to the employer a copy of the labour officer's report together with any particulars and information given by him and, by reason of the president's remarks, in creating in the employer a suspicion that he would not receive a fair hearing; secondly, that r. 8 of the Industrial Court Rules, 1960 (hereinafter referred to as the "Rules") which gave to the president of the industrial court a discretion to refuse to allow a party before the industrial court to be represented by an advocate was ultra vires, and that the refusal to allow the employer to be represented by an advocate was a fundamental breach of the rights of the employer; thirdly, that the industrial court in stating that the award applied to persons who were not parties exceeded its jurisdiction; fourthly, that the award in respect of gratuities and travel allowances must necessarily relate to a period in excess of two years and was thus in excess of jurisdiction; and fifthly, that the award in respect of wages was retrospective and consequently operated for a period in excess of two years and was thus in excess of jurisdiction. Mr. Nazareth also submitted that the award in its form subsequent to the decision of the Supreme Court was bad in relation to the individual items, first, of a wages increase, because it placed an undue financial burden on the employer, and, secondly, of housing and leave travel allowances and gratuities, because the grant of these was unjust. The union did not appear by an advocate but was represented by its secretary who, understandably, made no attempt to deal with matters of law raised by Mr. Nazareth. As a result the acting attorney-general, who had appeared before the Supreme Court as *amicus curiae*, was asked as *amicus curiae* to address the court on four points.

Turning to the ground that the industrial court had offended against the principles of natural justice, s. 14 (1) of the Ordinance requires the labour officer to report to the industrial court the fact that a settlement has not been effected and to give to the industrial court the fact that a settlement has not been effected and to give to the industrial court particulars and information concerning the dispute. Under s. 14 (3) the report shall state who the parties to the dispute are and this statement is, subject to any direction given by the industrial court, conclusive as to such parties. Under ss. 15 to 17 of the Ordinance the industrial court is required to hear the parties to the dispute and to make such award as appears to it to be just, the award being binding on the parties to the dispute whether or not they appeared at the hearing. Under s. 22 of the Ordinance a person bound by the award who fails to observe any condition of it commits a criminal offence. It will thus be seen that the report of the labour officer not only comes into existence for the purpose of the hearing before the industrial court but it is the very fons et origo of the award and, subject to any direction of the industrial court, conclusively determines who should be heard by the industrial court, who would be bound by the award, and who would commit an offence by failing to comply with the conditions of the award. Further, particulars and information may be contained in the report which a party may wish to controvert. Mr. Nazareth submitted that the refusal to make a copy of the report available to the employer was in itself a breach of the principles of natural justice. He also submitted that the remarks of the president of the

industrial court made at the commencement of the hearing could not have been based on any material then before the industrial court and known to the employer; and that they must thus either have been based on information contained in the report or result from prejudice on the part of the president, in either of which events the employer would not have had a fair hearing.

The question to be determined on this issue is whether there has been a failure of natural justice in relation to this particular award. If there has been a failure of natural justice by a quasi-judicial tribunal, and the industrial court is such a tribunal, then a party affected by the decision of the tribunal is entitled to have that decision set aside. In *H. C. de Souza v. Tanga Town Council* (1), [1961] E.A. 377 (C.A.), O'Connor, P., in a judgment with which the other members agreed, said at p. 388:

"If the presence of the complainants with the Appeals Committee in the absence of the appellant did constitute a departure from the principles of natural justice, it is immaterial that their presence may not have influenced the decision."

In *Annamunthodo v. Oilfields Workers' Trade Union* (2), [1961] A.C. 945, Lord Denning, in delivering the judgment of the Privy Council, said at p. 956:

"Mr. Lazarus did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside."

In order to determine whether there has been a failure of natural justice it is necessary to judge the actions of the tribunal whose decision is called in question against certain principles. These principles are not rigid and inflexible but vary according to the nature of the tribunal, the functions it has to perform and the provisions which may govern its procedure. As was said by Lord Jenkins delivering the judgment of the Privy Council in *University of Ceylon v. Fernando* (3), [1960] 1 All E.R. 631 at p. 637:

"... the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point."

In essence, in a case such as this one, the principles of natural justice require three things: first, that the tribunal should act in good faith; secondly, that a party who may be affected by the enquiry should know the nature and purport of the enquiry; and thirdly, that such a party should have an opportunity of presenting his point of view and of contravening statements which may be prejudicial to him. Whether in a particular case any of these principles is infringed depends, as I have said, on the facts and circumstances of that case. In the *University of Ceylon* case (3), for example, it was held that evidence taken in the absence of the person whose conduct was the subject of the enquiry was not contrary to the principles of natural justice as that person was informed of the nature of the evidence, had an opportunity to contradict it and had not sought to cross-examine the witness. It was, however, pointed out (see p. 641) that the position might well have been different if a request to cross-examine the witness had been made and that request had been refused. In *Johnson & Co. (Builders) Ltd. v. Minister of Health* (4), [1947] 2 All E.R. 395, a failure to make available to a person affected by the Minister's decision certain letters

written to the Minister before the inception of the quasi-lis did not in the circumstances of that case constitute a breach of the principles of natural justice. But at p. 404 Lord Greene, M.R., made it clear that matter which had come into existence for the purpose of the quasi-lis should be made available to all parties.

In my view, having regard to the functions of the industrial court and the provisions of the Ordinance under which it is established, it would be a failure of natural justice to refuse to provide to a party a copy of the labour officer's report. To begin with, not only is the report the foundation of the industrial court's jurisdiction but, subject to any direction of the industrial court, it is not possible to determine who are the parties to the dispute of which the industrial court is assuming jurisdiction until the report is seen. On the particular facts of this appeal it is all the more clear that the refusal to supply a copy of the report has occasioned a failure of natural justice. In the first place, there is the suggestion that the union should not have been a party to the dispute and it was pointed out that the industrial court sought to make the award applicable to persons who were not members of the union. As the report was not made available it is not possible to determine with certainty who are the parties to the dispute. Nor do I think it possible in this case to rely upon the maxim *omnia praesumuntur rite esse acta* as from the report itself it is apparent either that the industrial court has exceeded its jurisdiction or that it has failed to order all the parties to the dispute to attend before it. Secondly, the opening remarks of the president are such that they may well imply the existence in the report of matter prejudicial to the employer. Whether or not there is in the report any matter prejudicial to the employer, the charge of lack of good faith on the part of the employer made by the president of the court at the commencement of the hearing must result in the employer considering either that the report contained matter prejudicial to him or that he would not receive a fair hearing. In either event in the circumstances of this case there would be a failure of natural justice. Charges of a lack of good faith are not to be lightly made; and those concerned with the settlement of trade disputes, where good relations between employer and employee are of major importance, should consider carefully before making such a charge against either the employer or the employees.

For these reasons I consider that there has been a failure of natural justice on the part of the industrial court. It follows from what I have already said that in my view the award should be set aside in its entirety.

It thus becomes strictly unnecessary to consider the other grounds of appeal which were urged before the court. It is, however, most undesirable that awards of the industrial court should be, save in exceptional cases, the subject of appeals to the courts of law. In an effort to be of some possible assistance I set out very briefly my opinion on the other grounds.

Section 31 of the Ordinance empowers the making of rules "for regulating the practice and procedure to be followed" by the industrial court. In r. 8 of the Rules made under this section it is provided that a party to a dispute must first obtain the permission of the president before he may be represented by an advocate. The employer submits that r. 8 is *ultra vires* because it is contrary to the provisions of the Ordinance, which refers in a number of sections to the parties or their representatives, and also because it is unreasonable to deprive a person of his right to appear by an advocate. I cannot accept that the use of the phrase "or their representative" in the Ordinance entitles a party as of right to be represented by any person no matter how unsuitable that person may be. There must, I think, be a discretion vested in the industrial court. Rule 8 gives such a discretion to the president in relation to an advocate. In the settlement of industrial disputes it may very well be desirable that the parties



should deal directly with each other. I see nothing unreasonable in a procedural rule relating to a tribunal for the settlement of industrial disputes giving to the tribunal a discretion to refuse to either party the right to have his case presented to the tribunal by an advocate. Such a rule would not, of course, preclude either party from obtaining such legal advice and assistance as the party may consider necessary. For these reasons I do not consider r. 8 of the Rules ultra vires nor do I think that, in the circumstances of this case, the refusal to allow the employer to be represented by an advocate before the industrial court was a fundamental breach of the rights of the employer.

I have already dealt to some extent with the fact that the award was stated to apply to persons who are not described as parties in the preamble to the award. I should wish to leave open for argument the question whether an award which purports to apply to persons who are not parties is void in relation to persons who are in fact parties.

With regard to the submission that the award was in excess of jurisdiction as it related to a period exceeding two years, the fact that the award, in determining the rights of the employees during the period the award is in force, has regard to periods in excess of two years in order to ascertain those rights does not mean that it is in force for more than two years nor that it is in excess of jurisdiction. In determining the rights of a person during a particular period regard must necessarily in a number of cases be had to qualification related to a time outside the period: but this does not mean that the award which confers those rights was in force outside the period.

I think it clear that in making the wages increase retrospective and at the same time making the award have effect for two years prospectively the industrial court has exceeded its jurisdiction. Whether this has the effect of vitiating the whole award where the excess of jurisdiction relates only to one of the matters dealt with in the award I should prefer to leave open.

Subject to what I shall say later, I see nothing unjust in the award, in the form subsequent to the Supreme Court decision, in relation to the items of a wages increase, housing and leave travel allowances and gratuities. I have grave doubts, subject to the one reservation, whether the arguments which were addressed to this court on the subject of the undue financial burden and of unjustness truly raised any point of law. The submission that an award which imposed any new burden on an employer is unjust is clearly erroneous. With regard to gratuities, the award provided that they should be reduced appropriately "where the employee is dismissed for serious misconduct or grave neglect of duty". Before the Supreme Court the employer submitted that this was vague and uncertain and consequently made the award bad. The learned Chief Justice held that while the award in relation to gratuities was not bad as a whole, this provision was incapable of implementation and bad for uncertainty and he ordered the provision to be set aside. As a result of the decision of the learned Chief Justice gratuities would be payable in all circumstances to persons who qualified. This court has already held in *Cowasjee Dinshaw & Bros. (Aden) Ltd. v. Cowasjee's Staff Association* (5), [1961] E.A. 436 (C.A.), that such a provision would result in an unjust award. Unless the circumstances in which the right to a full gratuity is lost are set out with a degree of rigidity which will almost inevitably result in a number of hard cases, there must, in my view, be room for the exercise of a discretion. Where there is room for a discretion there is a measure of uncertainty. I conceive it by no means improbable that there will be a degree of uncertainty in many awards following an industrial dispute. If any such uncertainty exists in an award I feel strongly that the proper course of the parties is not to appeal to the courts of law *instanter* but to apply to the industrial court itself to remove the ambiguity or uncertainty. Such a power is given by s. 20 of the Ordinance and it seems manifest that this section was inserted for this very purpose.

For the reasons I have earlier set out I would allow this appeal with costs, set aside the judgment and order of the Supreme Court, Aden, and substitute therefore an order setting aside the award of the industrial court and ordering the respondent to pay the appellant's costs before the Supreme Court. The appellant has asked for a certificate for two counsel before this court, but in the particular circumstances of this case I would not grant such a certificate.

**Sir Ronald Sinclair P:** I have read the judgment of Newbold, J.A., and I agree with it. The appeal is allowed with costs and there will be an order in the terms proposed by him.

**Sir Trevor Gould Ag V-P:** I also agree.

*Appeal allowed. Judgment and order of the Supreme Court set aside.*

For the appellant:

*JM Nazareth QC and PK Sanghani*

*PK Sanghani, Aden*

The respondent did not appear by an advocate but was represented by the security

Appeared by an amicus curiae:

*MT Maloney* (Ag Attorney-General Aden)

For the respondent:

*JM Mody, Aden*

**Daphne Parry v Murray Alexander Carson as Personal Representative of MN  
Plataniotis, decd**  
[1963] 1 EA 91 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 8 March 1963                              |
| <b>Case Number:</b>      | 140/1961                                  |
| <b>Before:</b>           | Sir Ralph Windham CJ                      |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Trust and Trustee – Voluntary disposition inter vivos – Disposition by declaring new trust – Transfer of shares by beneficiary to the trustee – Subsequent oral direction to trustee naming new beneficiary – Transfer forms signed in blank by original beneficiary – Subsequent confirmation of the trust – Whether the direction a “grant or assignment of any trust” – Statute of Frauds, 1677, s. 9 – Law of Property Act, 1925, s. 53 (1) (c) – Judicature and Application of Law Ordinance, 1961, s. 2 (2) (T.).*

### **Editor's Summary**

The plaintiff sought a declaration that the defendant, in his capacity as executor and trustee of one Plataniotis (deceased) held the sum of £2,625 in trust for her by reason of the deceased's having held it in trust for her immediately prior to his death. The sum claimed represented a dividend declared in December 1956, shortly after the deceased's death, upon a 25% interest in the issued share capital of a company known as Lucy Estates Ltd. It was common ground that in 1936 the plaintiff's father, one Paraschis, acquired the equitable interest in this 25 % share capital and that the deceased, in whom it was vested held it as nominee of and trustee for Paraschis. The plaintiff claimed that on some date before the deceased's death she acquired the beneficial interest in the disputed shares hitherto held by her father Paraschis by virtue of a "surrender" by Paraschis to the deceased of his beneficial interest in them, followed by a declaration by the deceased, at Paraschis' request, that thenceforward he was to hold them in trust for the plaintiff, his married daughter. The sole question of fact for decision was whether at any time before the deceased's death on October 25, 1956, Paraschis ceased to be entitled, and the plaintiff became entitled, to this equitable interest. Though the claim was against the defendant only the Official

Receiver and the Commissioner for Income Tax, who might be required to indemnify the defendant, were joined as third parties and they maintained that the sum claimed had been held throughout upon trust for Paraschis and not the plaintiff. Both the defendant and the third parties also submitted that the transaction on which the plaintiff relied, whereby she became the beneficial owner of the disputed shares, was an oral assignment of a trust evidenced perhaps by writing but not effected by it, and that as such it was void by reason of s. 9 of the Statute of Frauds, 1677, which required “all grants and assignments of any trust or confidence . . .” to be in writing. The Statute of Frauds was not pleaded either by the defendant or the third parties and it was urged on their behalf that it was not necessary for them to do so, but they asked leave, during the closing addresses, to be allowed to amend their statements of defence to that end and were given provisional permission to file the necessary amendments.

**Held –**

- (i) the plaintiff had proved that she had become the beneficial owner of the shares on some date before the deceased’s death on October 25, 1956.
- (ii) the defence had failed to rebut the presumption of genuineness of the transaction effecting the transfer of the beneficial interest to the plaintiff.
- (iii) although there probably were ulterior motives behind the transaction which Paraschis effected, they were not such as to vitiate the transaction itself particularly since no fraud on his part had been pleaded.
- (iv) s. 9 of the Statute of Frauds applies in Tanganyika and if it is being relied on it must be pleaded.
- (v) the transaction in question was a “transfer by way of trust” and not an “assignment” and therefore did not fall within s. 9 *ibid* and there was no necessity for it to be in writing as distinct from its being merely evidenced or acknowledged in writing, and that it was accordingly a valid transaction.

Judgment for the plaintiff;

**Cases referred to in judgment:**

- (1) *James v. Smith*, [1891] 1 Ch. 384.
- (2) *Hills & Grant Ltd. v. Hodson*, [1934] Ch. 53.
- (3) *Bennett v Garvie* (1918), 7 E.A.L.R. 48.
- (4) *White, Wilson & Co. v. Chagbhai* (1922), 9 E.A.L.R. 65.
- (5) *Abdulrasul & Sons v. Amersi Mawji* (1930), 1 T.L.R. (R) 457.
- (6) *Hansen and Soehne A.m.b.H. v. Jetha Ltd.*, [1959] E.A. 563 (T.).
- (7) *Grey v. Inland Revenue Commissioners*, [1958] Ch. 375; [1958] Ch. 690; [1960] A.C. 1; [1959] 3 All E.R. 603.

**Judgment**

**Sir Ralph Windham CJ:** The defendant is the executor and trustee of the estate of one M. N.

Plataniotis (hereinafter referred to as the deceased) who died in Athens on October 25, 1956. The plaintiff, a married woman, is the daughter of one John Panayotis Paraschis (hereinafter referred to as Paraschis) who now resides in Athens. She attained the age of twenty-one in December, 1951. She married in May 1954, her maiden name having been Daphne Paraschis. The plaintiff seeks a declaration that the defendant, in his capacity as the deceased's executor, holds the sum of £2,625 in trust for her, by reason of the deceased's having (as she alleges) held it in

trust for her immediately prior to his death. She claims that this sum, with interest thereon, should accordingly be paid to her by the defendant.

This sum of £2,625 represents a dividend, declared in December, 1956 (that is, shortly after the deceased's death) upon a 25% interest in the issued share capital of a company engaged in the growing of sisal, known as Lucy Estates Ltd. It is common ground that in 1936 the plaintiff's father, Paraschis, acquired the equitable interest in this 25% share capital, and that the deceased, in whom it was vested, held it as nominee of and trustee for Paraschis. The sole question of fact for decision in this case is whether, at any time between then and the deceased's death on October 25, 1956, Paraschis ceased to be entitled, and the plaintiff became entitled, to this equitable interest. It is agreed that, if the plaintiff did become so entitled, then she was beneficially entitled to the dividend declared in December, 1956, and her claim must succeed; whereas if she did not become so entitled, her claim must fail.

The plaintiff's claim is against the defendant only. But should her claim succeed, the defendant may be entitled to be indemnified by the Official Receiver and/or by the Commissioner of Income Tax, who have for this reason been joined as third parties. Their possible liability to indemnify arises from the following undisputed facts, namely that, from February, 1958, to March 28, 1961, the deceased's estate was in fact administered by the Official Receiver who, without ever admitting the plaintiff's claim to the beneficial interest in the £2,625, paid that sum to the Assistant Commissioner of Income Tax, Kampala, in whose hands it still is, in compliance with a request from the latter that it should be so paid, on behalf of Paraschis, towards income tax claims against Paraschis. Both the Official Receiver and the Commissioner for Income Tax maintain that the £2,625 has been held throughout upon trust for Paraschis, and they have accordingly opposed the plaintiff's claim before me. Meanwhile the Official Receiver, at Paraschis' request, had on January 9, 1959, executed a formal transfer of the shares in favour of the plaintiff, and on November 25, 1959, the plaintiff was duly registered in the records of Lucy Estates Ltd., as the holder of the shares. But the question for decision now is, as I have said, whether the plaintiff was beneficially entitled to the shares at the death of the deceased on October 25, 1956.

The plaintiff's claim to be so entitled is set out in para. 4 and para. 5 of the plaint. These are preceded by para. 3, which recites briefly the following facts which have been undisputed at the trial:

- "3. From the year 1910 or thereabouts the said John Panayotis Paraschis was an employee of a limited company carrying on business at Dar-es-Salaam known as Ralli Brothers Ltd. By the terms of his employment the said John Panayotis Paraschis was prohibited from holding shares in any company without the consent of the employers."

para 4 and para. 5 then continue thus:

- "4. Notwithstanding that prohibition, the said John Panayotis Paraschis on or about May 4, 1936, acquired an equitable interest in 25% of the issued share capital of a limited company known as Lucy Estates Ltd. The said 25% shareholding was vested in the deceased as a nominee and trustee on behalf of the said John Panayotis Paraschis and the deceased signed a blank transfer in favour of the said John Panayotis Paraschis together with a letter stating the true character of his shareholding, namely, that he held the said shares as nominee and trustee as aforesaid.
- "5. On a date unknown to the plaintiff, but prior to the death of the deceased, the said John Panayotis Paraschis with a view to making a gift of his interest in the said Lucy Estates Ltd. to the plaintiff, surrendered the

said letter and transfer to the deceased who thereupon at the request of Paraschis signed a further blank transfer and letter in favour of the plaintiff. The plaintiff thereby became beneficially entitled to a 25% interest in the issued share capital of Lucy Estates Ltd.”

In short, the plaintiff claims that, on some date before the deceased’s death, she acquired the beneficial interest in the disputed shares hitherto held by her father Paraschis, by virtue of a “surrender” by Paraschis to the deceased of his beneficial interest in them, followed by a declaration by the deceased, at Paraschis’ request, that from now on he held them in trust, no longer for Paraschis, but for the plaintiff.

The evidence adduced in this case has been: first, the evidence of Paraschis in chief and in cross-examination, taken upon commission in Athens in May and June, 1962, and adduced on behalf of the plaintiff; secondly, the evidence of the defendant, given in this court; thirdly, the evidence of a chartered accountant of Kampala, Mr. Stewart, who has been investigating Paraschis’ accounts in connection with income tax inquiries, likewise given in this court and adduced on behalf of the Commissioner of Income Tax, together with documents produced by him; and lastly, an agreed bundle of correspondence, exhibit P. 1. The evidence going directly to establish the plaintiff’s case is that of her father, Paraschis, and an undated letter from the deceased to the plaintiff, the original of which has not been produced and is apparently unavailable, but whose contents are set out in a letter dated December 6, 1957, numbered as folio 8 in the agreed bundle, admittedly sent to Paraschis by the defendant acting as the deceased’s executor. It is not disputed by any party to this case that the deceased did in fact, write to Paraschis the letter whose contents are so out, which letter was found among the deceased’s papers after his death. Nor has any objection to it been raised on the ground that only secondary evidence of its contents has been produced. This undated letter reads as follows:

“Miss Daphne Paraschis,

I hereby acknowledge that the under mentioned shares are held by me as your nominee and I hereby undertake to deal with any dividends or other distributions and to exercise any voting rights attached to the said shares as you may from time to time direct and to execute transfer thereof if and when called upon and at all times to carry out your instructions in connection with all matters relating to the said shares.

750 shares of 20/- each fully paid numbered from 751 to 1,500.

1,750 shares of 20/- each fully paid numbered from 6,151 to 7,900.

Total 2,500 shares in Lucy Estates Company Limited.

(signed) M. Plataniotis.”

The letter from the defendant to Paraschis dated December 6, 1957, which sets out the undated letter as above, continues thus, referring to that undated letter as “the document”:

“The document bears no date.

Along with the document are:

Share certificate No. 3 for 750 shares numbers 751/1,500 and a transfer signed by Mr. Plataniotis in blank.

Share certificate No. 7 for 1,750 shares numbers 6,151/7,900 and a transfer signed by Mr. Plataniotis in blank.

The above 2,500 shares are at present standing in the name of the late Mr. Plataniotis and I have included them as part of his estate in the estate duty affidavit which I have filed in Tanganyika.

I should be glad if you would advise Mrs. Parry (formerly Miss Daphne Paraschis) and let me know what steps she proposes to take to establish her right to the shares.

I had no previous knowledge of this matter and if Mrs. Parry is entitled to the shares the necessary correction must be made as quickly as possible so that the estate duty affidavit may be amended.”

With regard in particular to the above undated letter from the deceased Plataniotis to the plaintiff, and in general to the double transaction upon which the plaintiff relies to establish her claim that the beneficial interest in the disputed shares, originally vested in Paraschis, became vested in her at some time before the deceased’s death, Paraschis himself gave the following evidence upon commission. Conceding that, by reason of his employment by Ralli Bros., his interest in those shares had to be kept secret from them because it contravened their regulations, he continued:

“In the beginning of the year 1952, when the plaintiff, my daughter, became of age, namely twenty-one years old, I requested Mr. Plataniotis to transfer the shares in the name of my only daughter (plaintiff) and this was done by Mr. Plataniotis. The transfer was effected by Mr. Plataniotis giving another letter to my daughter and a new title of transfer”.

This evidence of Paraschis with regard to what the deceased did would have been inadmissible as hearsay if the more first-hand evidence of it, namely the transcription of the deceased’s undated letter to the plaintiff itself had not been produced and admitted without objection.

No evidence has been adduced by the defence which is directly contradictory of this evidence of Paraschis and of the fact of the acknowledgment by the deceased, in the undated letter, that he was now holding the disputed shares as the plaintiff’s nominee, that is to say in trust for her as beneficial owner. But it has been strongly contended that, in the light of all the evidence, oral and documentary, and the general picture which emerges from it of Paraschis as a by no means scrupulously honest person, the whole transaction whereby his beneficial interest in the shares was ostensibly transferred to the plaintiff, was a sham or fictitious one, designed (*a*) further to conceal from Ralli Bros. the fact of his interest in the shares of Lucy Estates Ltd., and (*b*) to prevent the shares from being treated as his by the Income Tax Commissioner, with whom he was having trouble, whatever the merits of the disputes between him and them might be. A further point stressed in support of this argument regarding the alleged insubstantiality of the transaction on which the plaintiff relies is the admitted uncertainty on Paraschis’ part as to the date, or even the year, of the transfer of the beneficial interest in the shares to the plaintiff through the mediumship of the deceased. And it is pointed out that in a document, folio 14B, written in Paraschis’ own hand, being an account of dividends earned up to and including 1955, Paraschis is still referring to “my shareholding in the Lucy Estate Co. Ltd. held by Mr. M. N. Plataniotis as my nominee”, rather than to “my daughter Mrs. Parry’s shareholding” held by the deceased “as her nominee”.

After carefully considering these and similar earlier reference by Paraschis to the disputed shareholding, I am unable to conclude that, whether taken by themselves or even in conjunction with the other circumstances and apparent admissions that have been stressed by the defence, they establish, upon a balance of all the evidence, that the undated letter from the deceased to the plaintiff, the actual writing of which by him is not challenged, was merely a colourable “smoke-screen” and that it did not do, and was not intended to do, what it purported on the face of it to do. I would here observe that nothing in the nature of fraud on the part of the deceased or of Paraschis was pleaded in any of the written statements of defence, such as might have been held to make the



impunged transaction voidable. Nor, I would add, was Paraschis, when cross-examined on commission, asked to explain any of his documentary reference to the shares as “my” shares, upon which such stress has been laid by the defence in argument before me. He might well have admitted and explained that he had been using the word “my” loosely and inaccurately; for the shares had, after all, once been his for many years, and he may have continued so to refer to them through force of habit. We simply do not know. But the presence of the words in one or two documents under his hand is too slender a foundation on which even partly to base the conclusion that the whole transaction must have been a spurious one.

With regard to the date, or even the year, when the beneficial interest in the shares was transferred to the plaintiff through the mediumship of the deceased by his undated letter, it is quite true that not even the year of this transaction has been established, and that Paraschis, both in his evidence and in his correspondence, has shown considerable uncertainty and inconsistency on the point, saying at one time that he thought it took place at the beginning of 1952, and at another that it was in 1954. But this does not show that there was no genuine transfer at all any time. And there is one thing intrinsically established by this undated letter written by the deceased to the plaintiff under her maiden name, namely that it was written ex hypothesis before the death of the deceased in October, 1956, almost certainly before the plaintiff’s marriage in May, 1954, and also almost certainly after the plaintiff came of age in December, 1951. And the question whether it was written as early as January, 1952, or as late as May, 1954, is not of primary importance. For the plaintiff neither needs nor seeks to prove more than that the letter was written, and that accordingly she had become the beneficial owner of the shares, on some date before the deceased’s death on October 25, 1956. This she has certainly proved, if the evidence of Paraschis is to be believed and if the deceased’s undated letter is to be accepted as a genuine document; and subject always to the alternative defence based upon s. 9 of the Statute of Frauds, which I will consider presently.

It being conceded by the defence that the deceased in fact wrote to the plaintiff the undated letter in the terms set out in the letter from the defendant to Paraschis dated December 6, 1957, there is a presumption of regularity in favour of its being a genuine document meaning what it said, and against its being intended to have no legal effect of transferring, or of acknowledging the transfer of, any beneficial interest to the plaintiff, or indeed no other effect than that of mere camouflage. This presumption of genuineness the defence has, in my opinion, failed to rebut. It is true that Paraschis has been shown not to be a man of scrupulous honesty; and it may well be that, in causing the beneficial interest in the disputed shares to be transferred to his daughter he was actuated by the further motives of both thwarting the claims of the income tax authorities and more effectively concealing from Ralli Bros. the interest that he had had in the shares of Lucy Estate Ltd. at a time when, as their employee, he was recommending that their money should be used in developing that estate. This deception of Ralli Bros., I would here record, was later discovered, with the result that Paraschis forfeited a “parting gift” of probably about £10,000 on his leaving their employ. But although there probably were these ulterior motives behind the transaction which he effected, they are not such as to vitiate the transaction itself, particularly since as I have observed, no fraud on his part has been pleaded.

On these grounds I hold that, subject to what I shall now have to say on the question of s. 9 of the Statute of Frauds, 1677, the plaintiff has established her case against the defendant in his capacity as executor of the deceased’s estate. I would add that I was wholly satisfied with the defendant’s truthfulness in the witness box and with his previous attitude towards the plaintiff’s claim as

evidenced in his correspondence, which indicate that, whatever may be his views regarding the honesty of Paraschis, he has, as the deceased's executor, adopted throughout the impartial attitude of one who merely desires that the disputed dividend should be dealt with in whatever manner the court may direct.

I turn to the defence based on s. 9 of the Statute of Frauds. Briefly, it is the defendant's submission, and that of the third parties, that the transaction on which the plaintiff relies, whereby she became the beneficial owner of the disputed shares, was an oral assignment of a trust evidenced perhaps by writing but not effected by it; and that as such it was void by reason of s. 9 of the Statute of Frauds, which lays down that "all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same . . . or else shall likewise be utterly void and of none effect". There can be no doubt, to my mind, that in the present case the transaction whereby the equitable interest in the disputed shares, hitherto in Paraschis, became vested (as she alleges) in the plaintiff, was not itself in writing, although it was evidenced by writing.

The Statute of Frauds was not pleaded in any of the written statements of defence. It has been urged on behalf of the defendant and of the third parties that it was not necessary for them to plead it. But, without prejudice to that contention, they asked leave, during the closing addresses, to be allowed to amend their statements of defence to that end; and they were given provisional permission to file amendments to their defences accordingly, which they duly did on the next day, without prejudice to the plaintiff's contention that it was too late in the day to allow such amendments, a question which, among others, it now falls on me to decide. The points for decision, then, are the following, in the order given:

- (a) Was it necessary for the written statements of defence to plead s. 9 of the Statute of Frauds?
- (b) If it was, should the defendant and the third parties be allowed to amend their defences by pleading the section, at so late a stage as the conclusion of the addresses?
- (c) If they are so allowed, can s. 9 of the Statute of Frauds be shown to be part of the law of Tanganyika?
- (d) If it can, does it cover the disputed transaction?

The contention that it was not necessary to plead s. 9 of the Statute of Frauds by way of defence is based on the failure of para. 5 of the plaint to state specifically whether the transaction on which the plaintiff relied was an oral or a written one, s. 9 affording a defence only if the transaction was not in writing and signed. It is true that the plaint does not make this point clear. But the defendant could have asked for particulars on the point, and this he failed to do. Moreover, it is laid down in very clear terms by O. 8, r. 2, of the Indian Civil Procedure Rules, that the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law . . .". Under s. 9 of the Statute of Frauds, if applicable, the transaction would be void.

I therefore hold that if s. 9 of the Statute of Frauds is being relied on it must be pleaded, and I turn to the second question, namely whether the defendant and the third parties can be allowed to amend their defences so as to plead it as so late a stage as the closing addresses. Two cases have been cited to me for the plaintiff, where similar applications to amend at a late stage were refused; indeed, in the earlier case the Statute of Frauds had already been pleaded, but a different section of it from the one sought to be pleaded at the late stage. The cases are *James v. Smith* (1), [1891] 1 Ch. 384, and *Hills & Grant Ltd. v. Hodson* (2), [1934] Ch. 53. In the earlier case, however, it would appear that

the amendment would have taken the plaintiff by surprise, while in the later case it would, as Luxmoore, J., said at p. 63, “give the defendant an opportunity to take advantage of a pure technicality”. In the present case the application or otherwise of s. 9 of the Statute of Frauds is very far from a “pure technicality”; nor, in this case, is the plaintiff being taken by surprise. Learned counsel appearing on her behalf has frankly admitted as much, and indeed his carefully prepared arguments on s. 9 bear this out. Moreover, although s. 9 was not pleaded, it was expressly mentioned by the Official Receiver (third party) in a letter to the plaintiff dated October 5, 1960 (folio 24) and again in a letter to her then advocate, dated January 23, 1961 (folio 26), as a ground of defence against any claim she might make to the disputed dividend. Her plaint was filed on August 22, 1961. On these grounds, and because this court will lean in favour of allowing amendments of pleadings, at any stage, in order that all issues may be canvassed, and lastly because I think the question of s. 9 of the Statute of Frauds ought to be gone into in the interests of all parties concerned, I hold that it would be proper to allow the amendments sought and already provisionally filed, and I do allow them.

This accordingly brings me to the question whether s. 9 of the Statute of Frauds is part of the law of Tanganyika at all, a question which appears never to have been decided. There are two provisions of the laws of Tanganyika, under either of which it might be argued that s. 9 has been imported.

The first of these is the general provision in s. 2 (2) of the Judicature and Application of Laws Ordinance, 1961, which lays down that the jurisdiction of the High Court shall be exercised in conformity with, *inter alia*, the “statutes of general application in force in England on the twenty-second day of July, 1920”, subject always to the written laws of Tanganyika for the time being in force and so far as these do not extend or apply, and also “only so far as the circumstances of Tanganyika and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary”. Learned counsel for the defence and for the third parties do not base their submission on this provision of s. 2 (2) of the Judicature and Application of Laws Ordinance, 1961. I refrain therefore from deciding whether it would import s. 9 of the Statute of Frauds. I would merely mention in passing that in two decisions of the Supreme Court of Kenya and in one earlier decision of this court, all decided in the light of a provision of the law of the territory concerned identical with our present s. 2 (2), another section of the Statute of Frauds was held not to apply in Kenya or Tanganyika respectively, namely s. 4. But each decision was arrived at upon the ground that there was a particular provision of the law of the territory concerned with which s. 4 would have conflicted. In *Bennett v. Garvie* (3) (1918), 7 E.A.L.R. 48, the earlier of the Kenya cases, the particular provision was s. 9 of the Indian Transfer of Property Act; in *White, Wilson & Co. v. Chagbhai* (4) (1922), 9 E.A.L.R. 65, the later of the Kenya cases, it was s. 126 of the Indian Contract Act; while in *Abdulrasul & Sons v. Amersi Mawji* (5) (1930), 1 T.L.R. (R.) 457, the Tanganyika case, the decision in *Bennett v. Garvie* (3), was followed. In a later Tanganyika case, *Hansen & Soehne A.m.b.H. v. Jetha Ltd.* (6), [1959] E.A. 563 (T.) Simmons, J., held that s. 4 did apply in Tanganyika, though without apparently considering the earlier decisions to the contrary to which I have referred.

I venture no opinion as to which of these two conflicting decisions of this court was rightly decided; and in any event they were concerned with s. 4 of the Statute of Frauds and not with s. 9. I turn, rather, to the other provision of the laws of Tanganyika which can be argued to have imported s. 9, and upon which the defence have relied. This is s. 2 (1) of the Land (Law of Property and Conveyancing) Ordinance, whose long title is “An Ordinance to apply the English Law of Property and Conveyancing to the Territory”. Section 2 of this Ordinance reads as follows:

- “2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the Territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the Territory.
- “(2) Such English law and practice shall be in force so far only as the circumstances of the Territory and its inhabitants, and the limits of Her Majesty’s jurisdiction permit.
- “(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative act or Indian Act for the time being in force in the Territory, such last mentioned provision shall prevail.”

The defence relies on the words – “the law relating to . . . trusts and trustees in force in England on the first day of January, 1922”, in sub-s. (1) of the above section. There is nothing in the expression “the law”, it is submitted, to exclude statutory law; and in 1922, s. 9 of the Statute of Frauds was part of the law in force in England relating to trusts, requiring as it does that all assignments of any trust shall be in writing signed by the assigning party, or else shall be “utterly void and of none effect”. This is to my mind a perfectly sound proposition. Nor am I aware of anything in the requirement of s. 9 of the Statute of Frauds which the “circumstances of the territory and its inhabitants” would not “permit”, for the purposes of sub-s. (2) of s. 2, or which is inconsistent with any provision of the laws of Tanganyika, for the purpose of sub-s. (3). Certainly learned counsel for the plaintiff has not argued the existence of any such local circumstances or conflicting provision of the law. It cannot be said that the likelihood of fraud through false allegations of the oral assignment of beneficial interests, against which s. 9 of the Statute of Frauds is directed, is any less, or any greater, in Tanganyika than it is, or was, in England.

I accordingly hold that s. 9 of the Statute of Frauds does apply in Tanganyika; and I turn to the last point to be decided, namely whether the transaction in the present case constituted an “assignment” for the purpose of that section. For the purpose of determining this question it is important to take note that the English law to be applied is the law as it existed there on January 1, 1922. This is important because in 1925 s. 9 of the Statute of Frauds was repealed in England and replaced by s. 53 (1) (c) of the Law of Property Act, 1925; and the words of the replacing section differ from those of s. 9 in one respect which the courts in England have since held to have been significant, as I shall presently show. Section 53 (1) (c), which is not part of the law of Tanganyika, provides as follows:

- “53 (1) (c) A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.”

The alteration to which the English courts have attached significance, although semantically it might appear to have been intended as a mere restatement by an equivalent expression, is the replacement of the words “grants and assignments” in s. 9 of the Statute of Frauds by the word “disposition” in s. 53 (1) (c). In England recently the distinction between the old words and the new one was considered very carefully in the case of *Grey v. Inland Revenue Commissioners* (7), first in the Chancery Division of the High Court upon a case stated, next in the Court of Appeal, and finally in the House of Lords, all three hearings

being respectively reported *eo nomine* and in that order, in [1958] Ch. 375, in [1958] Ch. 690, and in [1960] A.C.I. The facts in that case, though by no means similar to those in the present case in externals, were in essentials, and from the point of view of the legal question to be decided, identical, namely the transfer (using the term in a neutral sense) of the beneficial ownership of company shares from A to B by means of a surrender of that beneficial ownership by A to the trustee (the legal owner) and a direction by A to him to hold them hereafter in trust for B and no longer for himself, A, this being followed by an acknowledgment by the trustee, the transaction not being effected in writing. The question was whether this constituted a “disposition” for the purpose of s. 53 (1) (c) of the Law of Property Act, 1925. In brief, Upjohn, J., held that the transaction would not have been a “grant or assignment of any trust” under s. 9 of the Statute of Frauds, it being a transfer or disposition by way of trust, and not an assignment. He then went on to hold that since it would not have fallen within s. 9, it therefore did not fall within the meaning of the expression “disposition” in s. 53 (1) (c) of the Law of Property Act, 1925, notwithstanding that it was a disposition of some kind (namely by way of trust), because the word “disposition” in s. 53 (1) (c) was directed at nothing more than was covered by s. 9 of the Statute of Frauds which it replaced. On appeal, the Court of Appeal reversed this decision, holding that although certainly the transaction would not have fallen within s. 9, it did fall within s. 53 (1) (c) as being a disposition, because the term “disposition” in the latter section was wider in scope than “grants and assignments” in the repealed s. 9. Their decision was upheld in the House of Lords.

The House of Lords were concerned with deciding the question directly before them, namely whether the transaction was a “disposition” within s. 53 (1) (c) of the Law of Property Act, 1925; and they expressly refrained from deciding whether it would have fallen within s. 9 of the Statute of Frauds, contenting themselves with upholding the decision of the Court of Appeal that “disposition” in s. 53 (1) (c) had a wider meaning than “grants and assignments” in s. 9, and observing (per Lord Radcliffe at p. 16), that “it is a very nice question whether a *parol* declaration of trust of this kind was or was not within the mischief of s. 9 of the Statute of Frauds. The point has never, I believe, been decided and perhaps it never will be.” But the emphatic views of the Court of Appeal on the point were not held to be wrong, and these, although in the event *obiter*, must be considered as at least of very strong persuasive authority. I would refer in particular to the following passages from the judgments of Lord Evershed, M.R., and Ormerod, L.J., from the report in [1958] Ch. 690. Lord Evershed said, at p. 714:

“If the present question had arisen for determination under s. 9 of the Statute of Frauds, it is, in my judgment, reasonably clear that it would have been answered in the same sense as in Upjohn, J.’s, judgment: for the transactions of February 18, 1955, could not, to my mind, have been sensibly described as constituting, or operating as, a grant or assignment of a trust or confidence – particularly bearing in mind the established law that a trust of personality could be effectively declared by *parol*.”

And Ormerod, L.J., said more briefly, at p. 722:

“If the meaning of the word ‘disposition’ is to be restricted to ‘grants and assignments’ then the case would not in my judgment be within the section.”

He went on, however, to hold that the meaning of “disposition” is not to be so restricted.

The basis of these pronouncements of the Court of Appeal, in which the conclusion of Upjohn, J., in the court below was supported, is that, whereas if

beneficiary A directly assigns his equitable interest to beneficiary B this is an “assignment” for the purpose of s. 9 and must therefore be in writing, nevertheless if the same result is achieved by beneficiary A surrendering his equitable interest to the trustee and by the latter thereupon, on A’s direction, holding that equitable interest in trust for B, then this is a “transfer by way of trust”, and not an “assignment” for the purpose of s. 9, and it does not therefore require to be effected in writing any more than the creation of a trust requires to be effected in writing. Such was the method used both in *Grey v. Inland Revenue Commissioners* (7), and in the present case. The distinction may appear to be artificial; and although, as I have said, the House of Lords in [1960] A.C.I., made no pronouncement upon it, Lord Radcliffe, at p. 16, went so far as to suggest, with regard to such a direction by A, that – “it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee”. But the considered pronouncements remain those of Lord Evershed, M.R., and Ormerod, L.J., in the Court of Appeal which I have quoted earlier, and these in their turn give approval to the following statement of the legal position by Upjohn, J., in the court below, [1958] Ch. 375, where at p. 381 he said:

“In my judgment a direction to trustees to hold trust property on trust for a donee operates as a transfer of the equitable interest to the donee by way of trust and not by way of assignment. In the first place the element of assignment, that is of direct passing of the equitable interest from donor to donee by appropriate words of assignment or gift, are lacking. Secondly, the only person who can effectively declare new trusts concerning the equitable interest is the donor himself.”

In the light of these observations of the learned Law Lords and of Upjohn, J., and in the absence of any other authority on the point, I hold that the transaction in the present case does not fall within s. 9 of the Statute of Frauds; that there was therefore no necessity for it to be in writing, as distinct from its being, as it was, merely evidenced or acknowledged in writing (in particular the undated letter of the deceased); and that it was accordingly a valid transaction.

Judgment will accordingly be entered for the plaintiff as prayed, with costs against the defendant. The question to what relief, if any, the defendant is entitled against the third parties, or either of them, is now open for determination.

*Judgment for the plaintiff.*

For the plaintiff:

*WD Fraser Murray and RS Thornton*

*Fraser Murray, Thornton & Co., Dar-es-Salaam*

For the defendant:

*ED Anagnostrars and MS Shukla*

*Anagnostrars & Shukla, Dar-es-Salaam*

For the official Receiver:

*WR Wickham (State Attorney, Tanganyika)*

For the Commissioner of Income Tax:

*MG Muli (Asst. Legal Secretary E.A. Common Service Organisation)*



For the third parties:

*The Official Receiver Tanganyika and The Legal Secretary EA Common Services Organisation*

**Hirji Sura and others Trading as Hirji Meghji & Co v R**  
**[1963] 1 EA 102 (SCK)**

**Division:** HM Supreme Court of Kenya at Nairobi  
**Date of judgment:** 26 October 1962  
**Case Number:** 201/1962  
**Before:** Rudd Ag CJ and Edmonds J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Practice – Revision – Alleged theft of property in Uganda – Property seized by police from third party in Kenya – No offence committed in Kenya – Order by magistrate restoring property to lawful owners – Whether magistrate has power to make such an order – Criminal Procedure Code (Cap. 27), s. 121 (3) (K.) – Penal Code (Cap. 24), s. 2 and s. 327 (K.) – Police Ordinance, 1960, s. 20 (1) (K.) – Sale of Goods Ordinance (Cap. 290), s. 25 (K.).*

**Editor’s Summary**

In the course of his investigations into the theft of a quantity of boot polish a police inspector visited the premises of the applicants and found there twenty-two cartons of tins of boot polish. He then applied to the magistrate’s court for permission to retain the cartons until his investigations were completed and in his supporting affidavit he stated that the cartons had been stolen from the owners in Kampala. The magistrate authorised the retention of the boot polish pending the completion of the investigations but subsequently the inspector informed the magistrate on affidavit that investigations had revealed that no offence had been committed by any person in Kenya, but that the Uganda police had detected an offence committed in Uganda. He, therefore, asked the magistrate to order the cartons to be returned to either the lawful owners or to the persons from whom they were seized, whereupon the magistrate ordered that the property be returned to the lawful owners. Subsequently, the advocates for the applicants asked the magistrate by letter to restore the property to the persons from whom they were seized but he refused stating he had no power to vary the original order. The applicants thereupon applied to the Supreme Court for a review of the magistrate’s order contending that he had no jurisdiction to order the property to be delivered up to the owners, that s. 121 (3) of the Criminal Procedure Code related only to offences committed within Kenya and that restoration should in accordance therewith have been made to the applicants from whom the boot polish had been taken.

**Held –**

- (i) the magistrate had power to direct, if he thought fit, that the property should be disposed of otherwise than by handing it over to the person from whom it had been taken.
- (ii) ordinarily it is not necessary that the thief should be prosecuted to conviction in order to establish

the title of the true owner, unless the property has been sold in market overt, which was not the case here.

- (iii) if the delivery of the boot polish to the agents of the lawful owners was not authorised by the magistrate's order, the remedy was not an application for revision, but an action against the police officer concerned and possibly against the agents.
- (iv) the objection that the magistrate's order, which was adverse to the applicants and made without their knowledge, was ultra vires or otherwise improper, was not a valid one as s. 121 of the Criminal Procedure Code does not require the magistrate to follow any particular procedural form of inquiry before he makes an order; in any event, the order in no way established the rights of ownership of anyone to the property in question and the applicants were at liberty to proceed against the alleged lawful owners or their agents for



the recovery of the property and damages if they were in a position to establish their rights.

- (v) the object of s. 121 (3) was not to establish the rights of claimants, but to protect the police from legal action at the instance of the party aggrieved.
- (vi) in the circumstances, the court was unable to say that the magistrate exercised his discretion in an improper manner or that his order was unjustified upon the information before him.

Application dismissed.

### **Cases referred to in judgment:**

- (1) *Bullock v. Dunlap* (1876), 2 Ex. D. 43.
- (2) *Winter v. Bancks*, 19 Cox C.C. 687.
- (3) *R. v. Macklin*, 5 Cox C.C. 216.
- (4) *R. v. Lushington, Ex parte Otto*, [1894] 1 Q.B. 420.

### **Judgment**

**Rudd Ag CJ:** read the following judgment of the court:

This is an application by the members of an Indian firm trading as Hirji Meghji and Company in Nairobi for the revision of an order made by a resident magistrate, Nairobi, ordering that twenty-two cartons of tins of Nugget boot polish be delivered by the police to Messrs. Reckitt, Coleman and Chiswick (East Africa) Ltd. The application for revision prays that the said order be set aside and that in substitution thereof an order should be made for the restoration of the said boot polish, or for the payment of Shs. 3,300/- as its value, to the applicants as the persons from whom the boot polish was taken by the police or that the property should be left to be restored to the applicants by the police.

The full facts of the matter are not stated in the application for revision but reference to the record shows that a chief inspector of police attached to the Nairobi Area Criminal Investigation Department was investigating the recovery of a quantity of boot polish which was stolen from Messrs. Reckitt, Coleman and Chiswick (East Africa) Ltd., in Kampala on the night of September 30/October 1, 1961. The chief inspector visited the premises of the applicants in Nairobi on December 30, 1961, and found there twenty-two cartons of Nugget boot polish, which the inspector stated in his affidavit had been stolen from Messrs. Reckitt, Coleman and Chiswick (East Africa) Ltd., in Kampala on the night of September 30/October 1, 1961. The chief inspector took possession of this boot polish and applied to the court for permission to retain the same until investigations were completed. He appears to have acted under the powers provided by s. 20 of the Police Ordinance. The magistrate authorised the retention of the boot polish by the police pending completion of their investigation. Subsequently, the same chief inspector of police informed the magistrate on affidavit that investigations had revealed that no offence had been committed by any person in Kenya, but that the Uganda police had detected an offence committed in Uganda by two Asians who had absconded from East Africa and were unlikely to return and whose present whereabouts was not known. He, therefore, prayed that the resident magistrate should decide on the restitution of the property seized and order it to be returned either to Messrs. Reckitt, Coleman and Chiswick (East Africa) Ltd., as the lawful owners thereof or to the persons from whom the

said property was seized. On May 25, 1962, the resident magistrate ordered that the property be returned to Messrs. Reckitt, Coleman and Chiswick (East Africa) Ltd.

It would seem from a letter written by the advocates for the applicants to the resident magistrate dated August 10, 1962, that the property was delivered to Messrs. R.O. Hamilton Ltd., who presumably were agents or nominees for Messrs. Reckitt, Coleman and Chiswick (East Africa) Ltd., whom we shall call the alleged owners. This letter asked the magistrate to order the police to take back the goods from Messrs. R.O. Hamilton Ltd., and to restore the same to the persons from whom they were seized. It also asked that the previous order for restoration of the goods to the alleged owners should be rescinded. The resident magistrate refused to comply with the request in this letter holding that the court had no power to vary its order.

The memorandum of revision sets out the grounds as follows:

- “1. There was no jurisdiction to order the property to be delivered up to Reckitt, Coleman and Chiswick (E.A.) Limited.
- “2. There was no jurisdiction to entertain such an application, nor any need for such an application by the police.
- “3. An adverse order to the applicants, behind their backs was ultra vires or otherwise improper and one that cannot stand.
- “4. Section 121 (3) of the Criminal Procedure Code, related only to offences within Kenya, and in any case restoration should in accordance therewith have been made to the applicants from whom the shoe polish was taken.
- “5. There was no authority or requirement of any law, for disposal of the shoe polish otherwise than by restoration to the applicants.
- “6. No case was made out or existed, whereby the magistrate could see fit to dispose of the shoe polish otherwise than to the applicants.
- “7. No offender having been prosecuted to conviction in the Kenya Courts (or elsewhere, which latter was insufficient) whereby the property in the goods could lawfully revert to any one under s. 25 (1) of the Sale of Goods Ordinance.
- “8. The police overstepped the limits of the order in delivering the shoe polish to R.O. Hamilton Limited contrary to the terms of the court’s order.
- “9. Reckitt, Coleman and Chiswick (E.A.) Limited, had no power to order or direct disposal to R.O. Hamilton, either on their own purported account or otherwise, contrary to the court’s order, and without variation thereof.”

It was suggested in argument that under s. 2 (b) of the Penal Code there was no jurisdiction for the order which was made by the learned magistrate. Section 2 (b) reads as follows:

- “2. Except as hereinafter expressly provided nothing in this Code shall affect –

. . . . .

- (b) the liability of a person to be tried or punished for an offence under the provisions of any law in force in the Colony relating to the jurisdiction of the Colonial courts in respect of acts done beyond the ordinary jurisdiction of such courts.”

We do not see how this provision can support the argument that there was no jurisdiction to make the order. Section 327 of the Penal Code makes it an offence for any person, without lawful excuse, knowing, or having reason to believe the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the Colony the person committing it would have been guilty of a felony or misdemeanour, to receive

or have in his possession any property stolen or obtained outside the Colony. Such a person is guilty of an offence of the like degree (whether felony or misdemeanour) and is liable to imprisonment for seven years. There was, therefore, ample jurisdiction and power for the police to enquire into the circumstances in which the boot polish alleged to have been stolen in Kampala was found in the possession of the applicants. Under s. 20 (1) of the Police Ordinance, 1960, there was power to search and the boot polish appears to have come into the possession of the police in the first instance in consequence of the exercise of powers provided by this sub-section. Under sub-s. (2) of the same section, s. 121 of the Criminal Procedure Code specifically applies. Section 121 reads as follows:

- “121. (1) When any such thing is seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.
- “(2) If any appeal is made, or if any person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.
- “(3) If no appeal is made, or if no person is committed for trial, the court shall direct such thing to be restored to the person from whom it was taken, unless the court sees fit or is authorised or required by law to dispose of it otherwise.”

There can be no doubt but that the boot polish comes within the scope of this section and, therefore, the resident magistrate's court had power, if it thought fit, to direct the property to be disposed of otherwise than by handing it over to the person from whom it was taken. There can be no question but that the resident magistrate had jurisdiction to order the disposal of the property as he thought fit.

This disposes of the first, second and fifth grounds as stated in the memorandum of revision. The magistrate was informed on oath that the alleged owners were in fact the true owners and that the property had been stolen from them in Kampala. This disposes of the sixth ground in the memorandum of revision.

Where property has been stolen it still remains the property of the true owner until the contrary is proved. Ordinarily it is not necessary that the thief should be prosecuted to conviction in order to establish the title of the true owner, unless the property has been sold in market overt. There is no suggestion that the property was sold in market overt. Section 25 (1) of the Sale of Goods Ordinance does not affect the law as we have stated it. This disposes of the seventh ground in the memorandum of revision.

If R.O. Hamilton Limited were the authorised agents of the alleged owners then the order which was made by the magistrate in no way barred the police from handing over the boot polish to R.O. Hamilton Limited, as agents for the alleged owners. This disposes of the eighth and ninth grounds of the memorandum of revision. But in any case even if the delivery of the polish to R.O. Hamilton Limited was not authorised by the order of the resident magistrate the applicants' remedy would not be the present application for revision, it would be an action against the police officer concerned and possibly against R.O. Hamilton Limited as well. There is nothing in the proceedings to prevent or bar the applicants from instituting such an action.

At first sight a more substantial ground is stated in ground 3, namely, that an adverse order to the applicants behind their backs was ultra vires or otherwise improper and one that cannot stand. The gravamen of this objection is that the magistrate made an order prejudicial to the applicants without giving

them an opportunity to be heard. It may, however, also be said that if he had ordered the property to be returned to the applicant he would be making an order prejudicial to the alleged true owners without giving them an opportunity to be heard. The section does not require the magistrate to follow any particular procedural form of enquiry before he makes an order under s. 121 (3) of the Criminal Procedure Code. Here he was faced with the position in which there were two possible claimants, one was stated on affidavit to be the true owner, the other did not appear to have any greater right to the property than that arising from the fact that it was taken out of his possession by the police. If it were the case that the magistrate's order for restitution had the effect of definitely establishing the rights of either of the claimants to the ownership of the property, it would have been wrong to make an order without giving each claimant the opportunity of being heard. But the order in no way establishes the rights of ownership of anyone to the property in question and the applicants are at liberty to proceed against the alleged true owners or Messrs. R.O. Hamilton Limited for the recovery of the property and damages if they are in a position to establish their rights.

The object of s. 121 (3) is not to establish the rights of claimants, it is to protect the police from legal action at the instance of the party aggrieved if they deliver the property to the person who was not entitled to it without an order of the court. In this connection the case of *Bullock v. Dunlap* (1) (1876), 2 Ex. D. 43, is in point. Further, in *Winter v. Bancks* (2), 19 Cox C.C. 687, which was a case in which property alleged to have been stolen was taken by the police from a person who was subsequently prosecuted for theft and acquitted, a police constable, who after the acquittal handed the property back to the person from whom it was taken by the police, was held in a suit against him by the true owner to be liable in damages for trover.

It appears to us from the judgment in *Bullock v. Dunlap* (1) that the magistrate is not bound to make exhaustive enquiries provided that he has sufficient information before him to enable him to decide as to whom he considers it fit to order the property to be delivered. He is entitled if he wishes to take time to consider the matter and he can make such enquiries and hear such persons as he thinks fit (*R. v. Macklin* (3), 5 Cox C.C. 216). But we do not think that he is bound to make any particular enquiry or hear any particular party if he considers that he has sufficient information already before him. He has a discretion to order the property to be delivered to whom he thinks fit according to the information given him but such order has not got conclusive effect as to the rights of claimants so that any claimant aggrieved by the order can pursue his legal claims by suit notwithstanding the magistrate's order (*R. v. Lushington, Ex parte Otto* (4), [1894] 1 Q.B. 420).

We are clearly of the opinion that it was not necessary for the magistrate to conduct a full trial of the issue of the definitive rights of ownership of the goods as between the applicants and the alleged owners. Ordinarily a court should not make an order which is prejudicial to a particular person without giving that person an opportunity to be heard. This is essential where the order affects or establishes or refutes a person's substantive rights and particularly rights of ownership. But as we have shown the magistrate's order in this instance does not establish any final right of ownership or even to possession of the goods.

At the time the order was made the police were lawfully in possession of the goods and the applicants were not in possession of the goods. The applicants' purely possessory title had been lawfully divested by reason of the goods passing out of their possession by the lawful action of the police and the previous order authorising the police to retain the goods pending completion of their investigations: see *R. v. Lushington, Ex parte Otto* (4), and Archbold (34th Edn.),

para. 846 at p. 310. If the applicants are in a position to show other circumstances entitling them to possession they can proceed by suit for the recovery of the goods or their value, but in so far as this application is concerned no such circumstances have been shown and the applicants appear to rely solely on the fact that they were in possession of the goods when they were taken by the police. That would be enough if there were nothing else but there was, in this case, other material before the magistrate sworn to by a chief inspector of police responsible for the investigations conducted by the police in Kenya, to the effect that the alleged owners were the lawful owners of the goods.

In all the circumstances we are unable to say that the magistrate exercised his discretion in an improper manner or that his order was unjustified upon the information before him. It was within his discretion to make the order and on the material before us we would not be prepared to interfere with that order.

But there were other circumstances which would prevent this court making the orders sought in the application. The magistrate's order has been carried out. Neither the police nor the magistrate's court have possession of the goods any longer. This court does not know whether or not the alleged owners or their agents still have possession of all the goods in question. There is no power to order compensation or damage in proceedings such as these. That is a matter appropriate to a suit. The application for revision is dismissed.

*Application dismissed.*

For the applicants:

*DN Khanna*

*Khanna & Co., Nairobi*

For the respondent:

*F Mallon (Crown Counsel, Kenya)*

*The Attorney-General, Kenya*

**Kenneth Thomas Clarke trading as Shipping General Services v Sondhi  
Limited**

**[1963] 1 EA 107 (CAM)**

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Mombasa                        |
| <b>Date of judgment:</b> | 6 February 1963                                   |
| <b>Case Number:</b>      | 68/1962   |
| <b>Before:</b>           | Sir Alastair Forbes V-P, Crawshaw and Newbold JJA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | H.M. Supreme Court of Kenya – Pelly Murphy, J     |

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*[1] Landlord and tenant – Unregistered lease for a fixed term of three years – Tenant in occupation of premises – Refusal to pay rent for period of use – Whether tenant liable to pay rent – Crown Lands Ordinance (Cap. 155, 1948) (Cap. 280), s. 47 and s. 127 (1) (a) (K.) – Registration of Titles Ordinance (Cap. 160, 1948) (Cap. 281), s. 1 (2), s. 32 and s. 40 (K.) – Indian Transfer of Property Act, 1872, s. 106 and s. 107.*

*[2] Landlord and tenant – Grant from the Crown – Special condition that grantee shall not sublet, assign or otherwise part with possession of premises without consent of Governor – Lease of premises to tenant – Consent not obtained – Whether lease invalid.*

*[3] Evidence – Admissibility – Unregistered lease – Whether admissible for purposes other than to establish a legal estate – Crown Lands Ordinance (Cap. 155, 1948) (Cap. 280), s. 127 (1) (K.).*

### **Editor's Summary**

By an unregistered lease dated October 26, 1961, the respondent purported to lease certain premises to the appellant for a period of three years from

November 1, 1961, at an annual rent of Shs. 42,024/- payable by monthly payments of Shs. 3,502/- in advance on the first day of each calendar month. The appellant took over possession of the premises on November 1, 1961, and paid the rent in full for that month and the month of December. He remained in possession during the month of January, 1962, but failed to pay a balance of Shs. 3,072/- for rent for that month, whereupon the respondent filed a suit in the High Court for that sum. The suit premises were held by the respondent under a Crown grant for ninety-nine years and one of the special conditions contained in the grant was that the respondent shall not assign, sublet or otherwise part with possession of the land without the previous consent of the Governor in writing, which in the instant case had not been obtained. The appellant in his defence denied liability on the grounds that the respondent had no cause of action as the lease had not been registered as required by law, that therefore it passed no legal estate, and that the unregistered lease was either void or unenforceable as the respondent had not obtained the necessary consent in writing for leasing the premises. The trial judge held that the unregistered lease operated as a contract and that the appellant was liable under the covenant therein to pay rent, but that if he were wrong in that conclusion the appellant was in any event liable in the same sum for use and occupation, even though the plaint did not contain an alternative claim based thereon, and that the failure to obtain the Governor's consent did not affect the right of the respondent to recover rent from the appellant. On appeal it was contended on behalf of the appellant that the respondent could not rely on the unregistered lease and that the plaint did not claim rent on the basis of any term other than the term of three years contained in the unregistered lease or on the basis of use and occupation, and that the trial judge was wrong in not holding that the lease was invalid for want of consent.

**Held –**

- (i) any breach of condition or covenant of which the respondent may have been guilty was a matter between the Crown and the respondent and that as the Crown had not sought to forfeit the grant the breach did not in the circumstances affect the relationship of landlord and tenant existing or purporting to exist between the respondent and the appellant.
- (ii) an unregistered lease could operate as a contract inter partes and confer on the party in the position of the intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registerable lease.
- (iii) the proviso to s. 40 of the Registration of Titles Ordinance does not exclude the use of an unregistered lease to show the terms of the contract between the parties.
- (iv) the respondent's claim was for payment of the rent due under the agreement for the period during which the appellant was in occupation and enjoyment of the premises.
- (v) the pleadings alleged that the "instrument of lease" was unregistered, and accordingly it was a matter of law as to what the rights of the parties were, with the result that there was no need to plead specifically that the "instrument of lease" constituted in law an agreement between the parties.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Denning v. Edwards*, [1960] E.A. 755 (P.C.).
- (2) *Souza Figueiredo & Co. Ltd. v. Moorings Hotel Co. Ltd.*, [1960] E.A. 926 (C.A.).



(3) *Bains v. Chogley* (1949), 16 E.A.C.A. 27.

## Judgement

**Crawshaw JA:** This is an appeal by the defendant against the judgment of the Supreme Court ordering him to pay the respondent company/plaintiff Shs. 3,072/- rent, with interest and costs.

The suit premises were held by the respondent under a Crown grant for ninety-nine years (hereinafter referred to as the “grant”) and were at all relevant times subject to certain charges thereon. By an instrument (hereinafter referred to as the “instrument”) dated October 26, 1961, the respondent purported to lease the premises to the appellant for a period of three years from November 1, 1961, at an annual rent of Shs. 42,024/- payable by monthly payments of Shs. 3,502/- in advance on the first day of each calendar month, commencing from November 1, 1961. The appellant took over possession of the premises on November 1 and paid the rent in full for that month and the month of December. He remained in possession during the month of January, 1962, but paid only a part of the rent for that month, the sum of Shs. 3,072/- being the balance remaining unpaid. It was for that balance the respondent sued and obtained judgment.

The appellant in his written statement of defence denied liability on the ground that the respondent had “no cause of action” as the lease had not been registered as required by law and therefore it passed no legal estate. He further maintained that the instrument was either void or unenforceable as the respondent had not obtained the necessary consents in writing for leasing the premises.

The learned judge held that the instrument, though not registered, operated as a contract and that the appellant was liable under the covenant therein to pay rent, but that if he was wrong in that conclusion the appellant was any way liable in the same sum for use and occupation, even though the plaint did not contain an alternative claim based thereon. On the question of consent, the learned judge held that the failure of the Governor to give his consent to the lease as required by condition 9 of the grant did not affect the right of the respondent to recover rent from the appellant.

I do not find the grounds of appeal in the memorandum very coherent, but in ground 5 it is said, “The lease though void, was admissible in evidence”, and that being a contract for a lease for a fixed period of three years, no statutory period (e.g. from month to month under s. 106 of the Indian, Transfer of Property Act as applied to Kenya) or implied term could be introduced, nor could a claim lie for use and occupation. In other of the grounds it was contended that anyway the plaint did not claim rent on the basis of any term other than the term of three years contained in the instrument, nor on the basis of use and occupation, and that the court therefore had no jurisdiction to pass a decree for rent outside the instrument. As for the rent claimed under the instrument, I understand ground 10 to mean that as the instrument should have been, but was not, registered, the respondent cannot rely for payment of rent on the term of three years. In other words it is contended that the respondent cannot rely on the instrument nor, as such was not pleaded, on any tenancy outside the instrument, nor for use and occupation. Ground 7 of the memorandum maintains that the learned judge was wrong not to hold that the lease was invalid for want of consent.

I will deal first with consent. The grant is made subject to the “provisions and conditions” of the Crown Lands Ordinance (Cap. 155) and the Registration of Titles Ordinance (Cap. 160) and also to the “Special Conditions” contained in the grant itself. Number 11 of the special conditions provides that the respondent shall not assign, sublet or otherwise part with possession of the land without the previous consent of the Governor in writing. There is no sanction, such as forfeiture or re-entry in the grant itself

for breach of a condition, but s. 47 (*a*) of the Crown Lands Ordinance says that a “covenant” not

to sublet, part with, etc., shall be implied, and s. 83 enables the Crown to apply to the court for forfeiture re-entry on breach of a covenant. No such application was however made in the instant case, and in my opinion any breach of condition or covenant of which the respondent may have been guilty was a matter between the Crown and the respondent and did not in the circumstances affect the relationship of landlord and tenant existing or purporting to exist between the respondent and the appellant. It has been argued, although with no great conviction, that apart from the Crown, the mortgagees failed to give their consent to the lease; their reason for so doing was because the Crown had refused to do so. Leasing the premises without their consent may have given the mortgagees certain rights, but if so they took no steps to enforce them; and here again I would say that the relationship of landlord and tenant as between the respondent and the appellant was unaffected.

Mr. Khanna, for the appellant, submitted that the instrument could not be put in evidence to prove a transfer of interest under the lease but could be put in to prove the agreement for a lease, and cited *Denning v. Edwardes* (1), [1960] E.A. 755 (P.C.); subsequent submissions by Mr. Khanna however appear to be somewhat in conflict therewith, including his submission that the instrument could not be looked at, even as evidence of the agreed rent. I think his argument here is rather similar to the argument he put up in *Souza Figueiredo & Co. Ltd. v. Moorings Hotel Co. Ltd.* (2), [1960] E A 926 (C.A.), where he is recorded at p. 930D as contending,

“that a covenant to pay rent contained in an agreement which operates as a present demise of land for upwards of three years is unenforceable if unregistered”.

Mr. Hira has submitted that the case of *Souza Figueiredo* (2) is relevant to the instant case, whilst Mr. Khanna submits that it is not because of the difference between the Uganda law (under which it was decided) and the Kenya law. The learned judge said:

“In my opinion the decision in *Souza Figueiredo’s* case is applicable in Kenya as it is in Uganda. Even if there had been in the Uganda Ordinance provisions similar to those contained in s. 20 and the proviso to s. 40 of the Kenya Ordinance, in my opinion, the decision in *Souza Figueiredo’s* case would have been the same because, as in the Uganda Ordinance there is nothing in the Kenya Ordinance which prevents the document operating as a contract between the parties to it.”

In that case, *Moorings Hotel Co. Ltd.* (which I will refer to as the “lessor”) as transferee of a sublease entered into an agreement to sublet to *Souza Figueiredo & Co. Ltd.* (which I will refer to as the “lessee”) premises for a period exceeding three years. An annual rent was payable by instalments. The lessee vacated the premises during the course of the lease owing arrears of rent, and on a suit being filed against it contended that it was not liable as the agreement had not been registered as required by the Uganda Registration of Titles Ordinance, (Cap. 123) (hereinafter referred to as the “Uganda Ordinance”). The trial judge held for the lessor and an appeal to this court was dismissed. The president of the court, in an exhaustive judgment, with which the other members of the court agreed, expressed the view at p. 928 that the agreement was intended to be a past or present, and not future, demise. The court was referred by Mr. Khanna, who appeared for the lessee, to certain sections of the Uganda Ordinance in support of his argument that a covenant to pay rent contained in an agreement which operates as a present demise of land for upwards of three years was unenforceable if unregistered, and that a covenant to pay rent is so bound up with the land that it cannot have effect unless it is part of a registered

lease; that rent issues out of the land and is bound up with the estate which the lease creates. The president at p. 931F observed that the Uganda Ordinance avoids the creation of an estate or interest in land by unregistered instruments and continued:

“but there is nothing in the Ordinance which renders such instruments ineffectual as contracts between the parties to them: there is nothing in the Ordinance to say that an unregistered document purporting to be a lease of, or an agreement to lease, land which is subject to the operation of the Ordinance for more than three years is void. In my view it can operate as a contract inter partes and can confer on the party in the position of intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registerable lease. That is not to override the provisions of the Ordinance, but to act in conformity with them.”

The president cited extensively from authorities which he found applicable, including at p. 933I a quotation from Fox’s treatise on the Transfer of Land Act, 1954, of the State of Victoria, Australia, in which, in relation to the effect of unregistered leases, it is said:

“In a matter resting on covenant it is the contract and not the estate which is the determining factor.”

Mr. Khanna has argued before us (as he apparently did in the *Figueiredo* case (2)) that equity cannot nullify an express prohibition contained in a statute, but I think that the president’s remarks in the *Figueiredo* case (2) at p. 935H are opposite in the instant case also, under Kenya law, that:

“to give effect to the agreement as a contract is not to override the Ordinance by an equitable rule, as Mr. Khanna suggests, but is merely to apply an equitable doctrine to the extent that is applicable without creating an estate or interest in the land or infringing the provisions of the Ordinance”.

Referring to other authorities the president, in the *Figueiredo* case (2), said at p. 937A:

“It seems that even at common law entry under an unregistered lease for more than three years creates a tenancy at will. A tenancy at will involves no definite interest in the land, but merely a personal relation for which, however, a rent may be reserved. Whether, therefore, the covenant to pay rent contained in the agreement be looked at as a contractual stipulation in a document of which specific performance could be obtained in equity or as a term of common law tenancy at will, it is, I think, enforceable.”

Mr. Khanna, inconsistent as it appears to be with other of his submissions, argues that the proviso to s. 40 of the Registration of Titles Ordinance makes the instrument invalid for any purpose, including evidence of the agreement. Section 40 relates to the form which leases for a period exceeding one year are required to take, and the proviso reads as follows:

“Provided always that no lease for the period above specified shall be valid unless registered.”

It seems to me clear in the context that the meaning is “valid as a lease unless registered”, and this I understood to be Mr. Khanna’s construction also. Section 20 of the same Ordinance says, *inter alia*, that a grant under the Ordinance shall not be capable of being transferred or otherwise dealt with except in accordance with the provisions of the Ordinance and that any attempt to do so “shall be null and void and of no effect”; here again in my opinion the meaning in the context is “of no effect so to transfer” etc., and I agree with

the learned judge that the section does not exclude the use of the instrument to show the terms of the contract. Leaving aside for the moment the Indian Act, there is nothing that I can see in comparison of the Uganda and Kenya laws which makes the principles in the *Figueiredo* case (2) inapplicable to the instant case.

Mr. Khanna has submitted that because of the provisions of s. 1 (2) of the Registration of Titles Ordinance, the Indian Transfer of Property Act (hereinafter referred to as the “Indian Act”) does not apply to the instant case as it would be inconsistent with the relevant provisions of the Ordinance. Section 1 (2) reads:

“(2) Except so far as is expressly enacted to the contrary no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance.”

Certain sections of the Indian Act were referred to by counsel, and Mr. Khanna fully argued them, should his submission of inconsistency not be upheld.

Reference has been made to s. 53 A of the Indian Act. Insofar as there may be inconsistency, I would hold that, by reason of the reference to non-registration, s. 53 A is an express enactment “to the contrary”; but quite apart from any question of inconsistency, it is not directly relevant to the present circumstances. By virtue of the appellant having gone into possession in part performance of the contract, the section would give him a defence against any endeavours of the respondent to exercise a right in respect of the premises other than a right expressly reserved in the contract; it is, says Mulla on the Indian Act (4th Edn.) at p. 271, a right to the defendant to protect his possession, and here it is not the appellant who is seeking relief. However, at p. 274 it is said:

“The transferor is not debarred from enforcing a right in respect of property which is expressly provided by the terms of the contract. So if the contract were an agreement of lease not provable because of want of registration, the lessee could not resist a demand for rent.”

That in my opinion is the position here.

Reference has also been made to s. 106 and s. 107 of the Indian Act. Section 107 takes us no further for the purposes of this appeal than s. 40 of the Registration of Titles Ordinance. Section 106 provides (in the circumstances of this case) that in the absence of a contract the premises would be deemed to be leased from month to month. I can see nothing inconsistent in that with the Registration of Titles Ordinance. A case in which that section was applied, and to which we have been referred, is *Bains v. Chogley* (3) (1949), 16 E.A.C.A. 27. The lessor there purported to lease the premises for manufacturing purposes for a period of five years to one Sidi Bilal at a monthly rent. The lease was unregistered and the magistrate held that the tenant was a tenant at will. On appeal to the Supreme Court De Lestang, J., apparently held that it was a lease from year to year by virtue of s. 106 of the Indian Act. On further appeal, this court upheld the decision of the Supreme Court, holding (in terms of the headnote) that under s. 102 (1) of the Crown Lands Ordinance (now s. 127 (1) in the 1948 Revised Edition of the Laws) –

“no court could be entitled to receive any evidence touching the unregistered agreement executed in 1941 for any purpose relevant to the consideration of the status of the parties as landlord and tenant.”

It is not necessary to consider this finding in the light of subsequent decisions, for the only interest in the case for our purposes is the view which the court

took of the relationship of the parties ignoring (as Mr. Khanna would have us do in the instant case) the agreement. Sir Barclay Nihill, C.J., expressly approved the following passage from De Lestang's judgment:

"It really boils down to this that in order to create a tenancy there must be a consensus, which in a proper case may be inferred from payment and acceptance of rent between the parties giving rise to the relation of landlord and tenant (*Ladies Hosiery and Underwear Ltd. v. Parker*, [1930] 1 Ch. 304). In the present case the respondent always intended that Sidi Bilal should be his tenant and he accepted rent from him in that capacity. It is true that the parties intended a particular kind of tenancy but it is equally clear that they were ad idem that Sidi Bilal should occupy as a tenant distinguished from a mere licensee at will."

However one looks at the instant case it seems to me that the respondent is clearly entitled to the rent for January, 1962. The matter is not complicated by any claim for rent in lieu of notice, the claim being one for a period of actual possession only. It is really unnecessary to look at the instrument, for the rate of rent is not in dispute nor that it was payable monthly in advance. Whether the appellant regarded his part payment for January as being in respect of part of the premises only I do not know (he did not give evidence, and his affidavits did not say so), but from the instrument it is clear that the premises were let as a whole. In my opinion the instrument can, if necessary, be looked at as containing the agreement between the parties. It cannot in law or equity be regarded as passing any estate, and it is possible that it could not be relied on to obtain specific performance of its terms if the registrar had properly refused his consent to the transaction (in the *Figueiredo* case (2) the registrar had wrongly refused registration, and specific performance could have been obtained on the agreement). The president in the *Figueiredo* case (2) said at p. 939F:

"The question is not the creation of an estate or interest in land but whether a term in a contract or a term of a tenancy at will can be enforced",

and at p. 938D he said:

"the respondent's claim is for payment of the amount which the respondent says is due under the agreement for the period during which the appellant was in occupation and enjoyment of the premises".

Such broadly is the position in the instant case, and I do not think it is necessary to decide whether in the particular circumstances the appellant held as tenant from month to month under s. 106 of the Indian Act or otherwise, or under some other tenure.

Mr. Khanna has submitted, as I understand him, that there is no consideration for the rent in the instant case, as the consideration was to have been a valid demise. It seems that he raised a similar argument in the *Figueiredo* case (2). As to this, the president said at p. 937I:

"Of course, the agreement could not be given effect to as a contract if there was no consideration to support it; but there was consideration. The appellant took possession under it and remained in occupation and enjoyment of the premises for a very considerable time."

In the instant case also the appellant was in possession of the premises during the period for which rent is claimed, and that is the consideration.

It is in my view a mere quibble to argue that because the claim in the plaint is made "under an instrument of lease" (the words used in the instrument itself), the instrument cannot be regarded as the agreement it is admitted to be.

The “issue” posed by Mr. Hira for the respondent in the court below (as well as before us) at the commencement of his argument was,

“Can the landlord recover rent from a tenant who is in possession of the premises under an unregistered lease?”

He then submitted that s. 32 of the Registration of Titles Ordinance did not invalidate the document (meaning presumably as evidence of the agreement) but made it invalid to pass any estate in the land. Mr. Hassan, who appeared for the appellant in the lower court, did not object to this line of argument, although when it was his turn to address the court he submitted that no cause of action was shown in the plaint because the “instrument of lease” and not an agreement was pleaded. Mr. Khanna adopted a somewhat similar line of argument on the pleadings in the *Figueiredo* case (2), but this court did not accept it. In the instant case the pleadings as a whole show that the “instrument of lease” was unregistered, and it is a matter of law therefore what were the rights of the parties, and it was not necessary to plead the law. No embarrassment on the pleadings has, in my opinion, been caused to the appellant.

I would dismiss the appeal with costs, and would observe that many of the arguments raised on the appeal would appear to be in defiance of principles enunciated by this court in cases in which counsel for the appellant was himself involved.

**Sir Alastair Forbes V-P:** I agree; the appeal is dismissed with costs.

**Newbold JA:** I also agree.

*Appeal dismissed.*

For the appellant:

*DN Khanna and SF Hassan*

*O’Brien Kelly & Hassan, Mombasa*

For the respondent:

*Ram Hira*

*Ram Hira, Mombasa*

**Bhimji Anand Shah trading as Shah Glassware Mart v Hercules Insurance  
Company Limited**

[1963] 1 EA 114 (CAN)

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 22 November 1962

**Case Number:** 53/1961

**Before:** Sir Ronald Sinclair P, Sir Trevor Gould JA and Mayers Ag JA

**Sourced by:** LawAfrica



**Appeal from:** H.M. Supreme Court of Kenya – Rudd, J

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*[1] Insurance – Arbitration clause – Claim by insured arising from loss by fire – Refusal by insurance company to admit liability but request to refer quantum to arbitration – Action filed by insured – Whether company’s action amounted to a denial of liability – Whether arbitrators award condition precedent to action – “Safe and Books” clause warranty – Whether claim supported by sufficient details.*

### **Editor’s Summary**

The appellant carried on a retail business in fancy goods, glassware, hosiery and the like and in March, 1958, took out a fire policy with the respondent for Shs. 50,000/- in respect of the stock-in-trade and the office furniture fixtures and fittings. He subsequently commenced to stock cloth and increased the cover to Shs. 100,000/- as from April 14, 1959. During the night of June 2/3,

1959, a fire extensively damaged the stock, furniture and fittings in the shop and the police took possession of the premises. The appellant and another man were later charged with arson in respect of the fire and the former was acquitted and the latter convicted. On June 8, 1959, the appellant signed a claim form under the policy claiming “approximately” Shs. 90,000/-, the particulars attached to the claim showing the loss at Shs. 94,849/78. After the criminal proceedings had terminated the appellant’s advocates wrote to the respondent asking if liability was admitted for the entire loss. The respondent did not admit liability, disputed the amount claimed and stated that it was obligatory on the appellant to proceed to arbitration under cl. 18 of the policy before filing any suit. The appellant filed a suit on June 1, 1960, claiming a sum of Shs. 89,766/-, being Shs. 97,076/- the value of the stock and furniture etc., destroyed or damaged less Shs. 7,310/- the value of salvage. In its defence the respondent admitted the contract of insurance, but averred, *inter alia*, that cl. 11 of the policy had not been complied with, that the claim was fraudulently excessive, that there was a breach of warranty in respect of a “Safe and Books” clause in the policy, that the fire was instigated fraudulently by the appellant for purposes of gain, and that, as the quantum of the claim was in dispute, by virtue of cl. 18 of the policy arbitration was a condition precedent to the right of action. Clause 11, *inter alia*, required the appellant to furnish within fifteen days after the loss of damage, a claim in writing for the loss or damage, containing “as particular an account as may be reasonably practicable”, and cl. 18, so far as material, required that any difference arising as to the amount of any loss or damage should be referred to the decision of an arbitrator “independently of all other questions” and further provided that:

“it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator – of the amount of the loss or damage if disputed shall be first obtained.”

The trial judge dismissed the suit on the ground that, by virtue of the provisions of cl. 18, arbitration as to the amount of loss or damage sustained, which was in dispute, was a condition precedent to a right of action. He further held that the suit could be dismissed on the grounds that the appellant was in default under cl. 11 and that the “Safe and Books” warranty had not been complied with. On appeal the appellant contended that the trial judge was wrong in holding that arbitration as to the amount of liability was a condition precedent to a right of action, submitting that the arbitration clause came into operation only if the dispute related to the amount of loss and not the question of liability and that there had been a clear refusal to admit liability coupled with an allegation that in any event the amount of loss was disputed. The respondent contended that the only difference between the parties before action was as to quantum, that failing to admit liability was not the same thing as denying liability, that the words “independently of all other questions” in cl. 18 must include questions of liability, that there was nothing to prevent a limited issue being referred to arbitration and that the arbitrator could not, in any event, determine the amount of liability as the amount of loss might not be the amount of liability.

**Held –**

- (i) the respondent’s refusal to admit liability amounted in the circumstances to a denial of liability and accordingly the obtaining of an arbitrator’s award as to the amount of loss was not a condition precedent to the action;

*Jureidini v. National British and Irish Millers Insurance Co. Ltd.*, 112 L.T. 531 and *Heyman v. Darwins Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337 applied.

- (ii) as regards cl. 11, the appellant had done all he could reasonably in the circumstances be expected to do in support of his claim.

- (iii) in determining whether there had been a breach of the “Safe and Books” warranty, regard must be had to the whole of the circumstances including the person with whom the respondent was contracting and, in the circumstances of the case, there had been substantial compliance therewith by the appellant.
- (iv) the appellant was entitled to be indemnified by the respondent in respect of the loss or damage to the stock and fittings in the shop occasioned by the fire.
- (v) in view of the evidence the court would not interfere with the trial judge’s finding on the question of quantum of loss.

Appeal allowed.

#### Cases referred to in judgment:

- (1) *Heyman v. Darwins Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337.
- (2) *Jureidini v. National British and Irish Millers Insurance Co. Ltd.* (1915), 112 L.T. 531; [1915] All E.R. Rep. 328.
- (3) *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*, [1926] A.C. 497; [1926] All E.R. Rep. 51.
- (4) *Nemchand Premchand Shah v. South British Insurance Co. Ltd.*, [1962] E.A. 131 (C.A.).
- (5) *In re Bradley and Essex and Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415.

November 22. The following judgments were read:

#### Judgement

**Sir Ronald Sinclair P:** This is an appeal from a judgment and decree of the Supreme Court of Kenya dismissing with costs a suit by the appellant against the respondent company (hereinafter referred to as “the company”) claiming the sum of Shs. 89,766/- being the amount of loss or damage to the stock and fittings in the appellant’s shop alleged to have been caused by a fire on the night of June 2/3, 1959, which loss or damage, it was alleged, was a risk covered by a policy of insurance entered into between the company as insurer and the appellant as the assured. There was a cross-appeal seeking to support the decision of the Supreme Court on grounds other than those relied on by the learned trial judge, but it was abandoned at the hearing.

The appellant is an Asian trader who, since 1954, had carried on a retail business in premises in Bazaar Road, Nairobi, under the name of “Shah Glassware Mart”. In March, 1958, he took out a fire policy with the company for Shs. 50,000/- in respect of the stock-in-trade and the office furniture, fixtures and fitting in the shop, the stock being covered in the sum of Shs. 42,500/- and the furniture, etc. in the balance of Shs. 7,500/-. The proposal was signed by the appellant on March 18, 1958, and the policy was issued on March 20, 1958, covering the appellant from the date of the proposal. Up to about the end of 1958 the appellant’s stock consisted of fancy goods, glassware, hosiery and the like. He then commenced to stock cloth and the cover was increased to Shs. 100,000/- as from April 14, 1959.

During the night of June 2/3, 1959, a fire extensively damaged the stock, furniture and fittings in the shop. It appears that the fire had its origin in an act of incendiarism in the adjoining premises and that it

spread to the appellant's shop. Immediately after the fire the police took possession of the premises and the appellant and another man were subsequently charged with arson. The appellant was acquitted and the other man was convicted. That was in April, 1960.

On June 8, 1959, the appellant signed a claim form claiming “approximately” Shs. 90,000/-. Particulars attached to the claim showed a loss of Shs. 92,886/78 in respect of stock and Shs. 1,963/- in respect of furniture and fittings, a total of Shs. 94,849/78.

After the criminal proceedings had terminated the appellant’s advocates wrote to the company asking if liability was admitted for the entire loss suffered by the appellant. Correspondence then ensued between the parties or their advocates. I shall refer later to this correspondence: it is sufficient at this stage to say that the company did not admit liability, disputed the amount of the claim and stated that it was obligatory on the appellant to proceed to arbitration under cl. 18 of the policy before filing any suit.

The plaint was filed on June 1, 1960, claiming the sum of Shs. 89,766/-, being Shs. 97,076/- the value of stock and furniture etc., destroyed or damaged less Shs. 7,310/- the value of salvage. In the defence the company admitted that the contract of insurance was entered into, but averred, *inter alia*, that the extension of cover was obtained with fraudulent intent and that there was a large, intentional and fraudulent over-insurance. Those particular defences were abandoned at the trial. Other defences not abandoned were substantially as follows:

1. That cl. 11 of the policy had not been complied with.
2. That the claim was fraudulently excessive.
3. That there was a breach of warranty in respect of the “Safe and Books” clause in the policy.
4. That the fire was instigated fraudulently by the appellant for purposes of gain.
5. That as quantum was in dispute, by virtue of cl. 18 of the policy, arbitration was a condition precedent to the right of action.

The learned trial judge held that by virtue of the provisions of cl. 18 of the policy, arbitration as to the amount of loss or damage sustained, which was in dispute, was a condition precedent to a right of action and, therefore, that the suit should be dismissed on that ground alone. However, he went on to consider the other defences and held that there were other grounds on which the dismissal of the suit could be justified. First, he held that the appellant was in default under cl. 11 of the policy and that the company was thereby absolved from liability. Secondly, he held that there had been such a non-compliance with the “Safe and Books” warranty that the company was on that ground also absolved from liability. As to the issues of fraud, namely that the appellant was a party to the arson and that the claim was fraudulently excessive, he held that, although there was ground for grave suspicion, the allegations had not been established. With regard to the quantum of loss, he found that the claim was excessive and that the amount of loss proved to have been occasioned by the fire, less salvage, was Shs. 31,577/45. Since that figure was an estimate he “rounded it out” as Shs. 32,000/- which was the amount he would have adjudged as due to the appellant if he had been entitled to succeed.

The first point taken on behalf of the appellant was that the learned judge was wrong in holding that arbitration as to the amount of liability was a condition precedent to a right of action. Clause 18, the arbitration clause, which is one of the conditions of the policy, so far as it is material, reads:

“If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator . . . And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator . . . of the amount of the loss or damage if disputed shall be first obtained.”

Clauses 13 and 19 are also relevant. They provide:

- “13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection or (in case of an arbitration taking place in pursuance of the eighteenth condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.”
- “19. In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.”

Before proceeding further it may be useful to set out certain basic principles applicable to the operation of an arbitration clause in a contract of insurance when liability is repudiated. I cannot do better than quote the following words of Lord Porter in *Heyman v. Darwins Ltd.* (1), [1942] A.C. 356 at p. 398:

“Where the contract itself is repudiated in the sense that its original existence or its binding force is challenged, e.g., where it is said that the parties never were *ad idem*, or where it is said that the contract is voidable *ab initio* (e.g., in cases of fraud, misrepresentation or mistake), and that it has been avoided, the parties are not bound by any contract and escape the obligation to perform any of its terms including the arbitration clause unless the provisions of that clause are wide enough to include the question of jurisdiction. Where, however, the existence of the contract is acknowledged but one of its terms is relied on as disentitling the claimant to recover, the arbitration clause is effective.”

It will be convenient now to refer in some detail to the correspondence before action. On December 15, 1959, the appellant’s advocates wrote to the company stating that the appellant had already lodged his claim with the company and that he held the company fully responsible and liable to him for the entire amount of the loss. The company replied on January 4, 1960, that until the result of the criminal case was known it was not in a position to deal with the matter. On April 27, 1960, after the criminal proceedings had terminated, the appellant’s advocates wrote again to the representatives of the company in East Africa notifying them of the result of those proceedings and asking if liability was admitted in respect of the entire loss suffered by the appellant. The company’s advocates replied on May 25, 1960, stating, *inter alia*:

- “3. Our clients have instructed us to write for the documents in support of your Shs. 90,000/- claim and ask for a more detailed statement.
- “4. The above request we should make it absolutely clear is not to be taken as any admission of liability. Our clients are reserving the right to resist any claim made by Mr. Shah and to do so if necessary in a court of law.”

In answer to that letter the appellant’s advocates, on May 28, 1960, wrote as follows:

“We thank you for your letter of the 25th instant on behalf of your client Messrs. Hercules Insurance Company Limited.

“Quite apart from the fact that it would be pointless and futile to enter into details in support of our clients’ claim we do not feel that until such

time that we have received from your client a clear unequivocal and categorical admission of liability any point will be served in entering into details of our clients' claim.

"As your client has denied and repudiated liability in the matter our clients are left with no alternative but to institute proceedings in court for recovery of their claim and this we shall proceed to do on the 31st instant unless by 4 p.m. on Monday the 30th instant we have in our hands a letter signed by your client admitting as aforesaid in clear terms its liability in the matter.

"Clause 19 of the policy prescribes a period of limitation and even though we are of the opinion that our clients have still got some months within which to file their claim nevertheless our clients cannot be expected to take any chances in the matter we regret that with a view to safeguard their interests it will be essential to file action by the latest on the 31st instant and it is for this reason that we ask for a clear and a categorical admission of liability.

"Clause 18 of the policy provides for any difference as to the amount of any loss or damage to be referred to arbitration but clearly when your client chooses to deny and repudiate liability altogether that clause has no application.

"We must add that your client will be held fully responsible for all costs and consequences in the event of a failure to forward us a written admission of liability prior to 30th instant as aforesaid.

"We should also add that your client has had the fullest opportunity to satisfy itself about our clients' claim and in fact our clients' books of accounts, invoices, statements and other supporting vouchers and papers were handed over to your client and remained with your client for several months and consequently it is a little difficult to understand your request for documents in support of our client's claim."

The company's advocates replied on May 31, 1960, paras. 3 and 5 of which read:

"3. If you are correct in the expression contained in the opening lines of your third paragraph namely that our client company has denied and repudiated liability we do not understand your request for a clear and categorical admission.

.....

"5. We must also take this opportunity of stating that in our opinion cl. 18 of the policy makes it absolutely obligatory on your clients to proceed with arbitration before filing any suit since the figure of loss claimed by your clients i.e. Shs. 90,000/- is in our view grossly exaggerated and excessive if indeed not by itself fraudulent and we have never admitted it and our information is that the correct figure is less than one tenth of that amount and the question of quantum is very definitely in dispute."

That was the last letter before action.

Referring to the effect of this correspondence the learned judge said:

"... at the time the suit was filed the defendants had not in my opinion unequivocally committed themselves to an allegation of fraud which, if substantiated, would have the effect of avoiding the contract ab initio. There was ground for suspicion that the defendants would dispute liability either on the basis of fraud or on other grounds which might be within the contract. The plaintiff, in fact, was anxious to find and to accept a repudiation on the part of the defendant and, though the defendants were

considering the possibility of eventually repudiating the contract on grounds, *inter alia*, of fraud, they were unwilling to commit themselves at that stage. In fact, the contract was not repudiated until the written statement of defence was filed.

“In these circumstances I think that when the suit was filed the plaintiff had no right of action and was still bound by the condition precedent in the arbitration clause, since the contract had not at that time been unequivocally repudiated by the defendants.”

The learned judge also considered the effect of the allegation in the defence of deliberate fraudulent over-insurance, which he said was clearly a repudiation by the company of the contract, and held that it did not operate as an effective justification *ex post facto* for the appellant’s resort to a suit.

Mr. Gratiaen, for the appellant, did not submit that there was a repudiation of the contract of insurance in to before the suit was filed, but contended that the correspondence showed that there was a denial of liability under the contract coupled with an allegation that the amount of the loss was in any event disputed. On that construction his argument ran as follows: The arbitration clause comes into operation only if the amount of loss is in dispute and liability is not denied. Here there was a clear refusal to admit liability coupled with an allegation that in any event the amount of loss was disputed. The true interpretation of cl. 18, when considered with cl. 13 and cl. 19, is that, where liability is not admitted when an admission is asked for, then it is not obligatory on the assured to proceed in the first instance to arbitration for the limited purpose of obtaining a finding as to the amount of liability in the event of a court of law later holding that there was liability. Clause 13 indicates that if a claim is made and rejected, then the issue of liability, whatever the amount of loss may be, is the vital and essential issue and in such a case the rejected claim must go to the ordinary courts of law within three months of rejection. Clause 18 is limited to a live, concrete and effective dispute which is capable of resulting in an arbitrator’s award of the amount of loss which, as an award, would be enforceable in a court of law. There is no effective dispute as to the amount of loss if there is a dispute as to liability, since determination of liability must precede determination of the amount of loss. A hypothetical award is not an award at all and cannot be enforced.

Mr. O’Donovan, who appeared for the company, submitted that the only difference between the parties before action was as to quantum: that failing to admit liability is not the same thing as denying liability: that the words “independently of all other questions” in cl. 18 must include questions of liability: that there is no support in the decided cases for the proposition that there is no need to go to arbitration if liability is not admitted: that there is nothing to prevent a limited issue being referred to arbitration: and that the arbitrator cannot, in any event, determine the amount of liability as the amount of loss may not be the amount of liability, for example, the loss may be Shs. 100,000/- and the amount of cover only Shs. 50,000/-. As to Mr. Gratiaen’s submissions with regard to cl. 13, he said that that clause contemplates legal proceedings without arbitration, first, when the amount of loss is not in dispute, secondly, when arbitration is waived and, thirdly, when the insurer has repudiated the contract. Those conditions do not exist here. In all other cases arbitration as to the amount of loss is a condition precedent to any right of action.

I do not think it is disputed as a general principle that, where arbitration is made a condition precedent to the commencement of any action and the assured declines arbitration and commences an action, the insurance company may either set up the arbitration clause as an absolute defence to the action or waive the condition precedent and, treating the clause as merely a collateral



agreement to refer, apply for a stay of proceedings pending a reference under s. 18 of the Arbitration Ordinance (Cap. 22). In *Heyman v. Darwins Ltd.* (1), at p. 377 of the report Lord Wright said:

“The contract, either instead of, or along with, a clause submitting differences and disputes to arbitration, may provide that there is to be no right of action, save on the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect unless the condition has been ‘waived’, that is, unless the party seeking to set it up has somehow disintitiled himself to do so.”

In the present case the company did not apply for a stay, nor was it argued that the condition precedent in the arbitration clause had been waived.

In my view the letters of the company’s advocates of May 25 and 31, 1960, when read in the context of the correspondence as a whole, show a refusal to admit liability amounting to a denial of liability. If there is any doubt about the meaning of the correspondence it is resolved by the defence which relied upon allegations which constituted a repudiation of the contract as a whole on the ground of fraud, and upon other allegations, presumably in the alternative, which were allegations of breach of contract only. That confirms the appellant’s interpretation of the correspondence as a denial of liability. The question for decision, therefore, is whether, when the company disputed its liability under the policy as well as the amount of the loss, the award of an arbitrator under cl. 18 of the amount of the loss was a condition precedent to any action.

In support of his submissions Mr. Gratiaen relied on the decision of the House of Lords in *Jureidini v. National British and Irish Millers Insurance Company Ltd.*, (2), 112 L.T. 531 and observations on that decision made in *Heyman v. Darwins Ltd.* (1). *Jureidini’s* case (2), concerned a claim under a fire insurance policy which contained two clauses, namely cl. 12 and cl. 17, which were in similar terms to cl. 13 and cl. 18 respectively in the instant case. There was a dispute as to the amount of loss carried on in correspondence, followed by a rejection of the claim in toto. Finally the ground of the total rejection was stated as an allegation of arson. Action was brought on the policy of insurance; in their amended defence the insurance company denied the loss alleged, pleaded fraud, in that the amount claimed was grossly in excess of the value of the goods, and arson as an answer to the claim, and that the arbitration clause was a condition precedent. The reply contended (*inter alia*) that the insurance company had never disputed the amount of the loss and that therefore the arbitration clause did not apply. It was stated in argument (p. 533, col. 1 of the report) that at the trial the accountants called on behalf of the parties agreed upon the amount of loss of stock. It was one of the arguments by counsel for the appellants in the House of Lords that the letters indicating a dispute as to amount were prior to the rejection in toto of the claim and that whether there was a dispute or not ceased to be material as soon as the respondents repudiated the claim in toto.

The basis of Lord Haldane’s opinion was not approved in *Heyman v. Darwins Ltd.* (1), and need not be discussed. Lord Dunedin, after referring to the arbitration clause, said:

“I think it is perfectly clear that that clause necessarily refers to an existing difference, not a historical difference, and it seems to me that when the attitude was taken up by these parties which was taken up in the letters that have been read to me, which the learned Lord Chancellor has referred to, in England, that they repudiated the claim altogether and said there was

no liability under the policy whatsoever, that necessarily cut out the effect of cl. 17 as creating a condition precedent against all forms of action.”

Lord Atkinson said:

“I concur on this short ground. I think cl. 17 refers to existing disputes and differences about the amount of loss claimed, and in a contract on indemnity such as this is I do not think that clause has any application whatever, when the person to indemnify says: ‘You yourself brought about the destruction of the goods that were insured for an indemnity for which you claim’, and insists upon a clause which provides that in that state of circumstances all benefit under the policy is forfeited.”

Lord Parker merely expressed agreement without stating any ground. Lord Parmoor said:

“I concur. The respondents raised an issue on which, if they had succeeded, the appellants would have forfeited all benefit under the policy. This, in my opinion, would have included that benefit that would have been forfeited under cl. 17 of the contract, the policy. At the same time, I should like to express my own opinion that no difference would have arisen as regards matters that could have come under cl. 17, and therefore the clause did not in any case apply.”

Concerning these judgments a number of opinions were expressed by their lordships in *Heyman v. Darwins Ltd.* (1), Viscount Simon, L.C., at p. 365 said:

“Lord Dunedin pointed out (1915) A.C. 499, 507 that the arbitration clause only applied to differences as to amount of loss and, therefore, not to a claim which the respondents rejected altogether, whatever the loss might be. Lord Atkinson (1915) A.C. 499, 507 rested his judgment on this last point alone. Lord Parker concurred without distinguishing reasons. Lord Parmoor said expressly *ibid*, 508, that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. It is on this second ground that I think the majority of the house should be regarded as having decided the appeal.”

There the wording used with reference to Lord Dunedin’s speech interprets it as meaning that the arbitration clause had no place if liability for the whole claim was rejected. Lord Wright said, at p. 386:

“It is also clear that the House of Lords in reversing the decision of the Court of Appeal and restoring the judgment of the trial court, must have held that the condition precedent was for some reason not binding on the assured. It is unfortunate that the exact grounds on which the House so held are not definitely expressed, but I think that the ratio decidendi was that the company, by claiming that all benefit under the policy had been forfeited, had, in Lord Dunedin’s words (1915) A.C. 499, 507, ‘necessarily cut out the effect of cl. 17 as creating a condition precedent against all forms of action’. Lord Atkinson and Lord Parmoor seem also to say that the condition precedent clause had no application because no difference had arisen (or, apparently, in the circumstances could arise) as to matters that could come within that clause. Lord Dunedin suggests that the company might have met the difficulty by having the issue of liability decided by a jury and requiring the amount of damage to be ascertained by an arbitrator.”

In a later passage at p. 387 Lord Wright continued:

“Lord Sumner in *Macaura v. Northern Assurance Co. Ltd.*, [1925] A.C. 619, 631, states the effect of the decision in *Jureidini v. National British and*

*Irish Millers Insurance Co. Ltd.*, [1915] A.C. 499, 597, to be 'that the defendants could not both repudiate the contract in toto and require the performance of a part of it *which only became performable when liability was admitted or established*.' I have italicised these last words because I think they distinguish *Jureidini's* case (*supra*) from cases like *Woodall v. Pearl Insurance Co. Ltd.*, [1919] 1 K.B. 593, which Lord Sumner approved. In *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*, [1926] A.C. 497, 512, he repeated much the same idea, adding 'it is a case of approbation and reprobation.' Perhaps what Lord Sumner means is that the company had somehow prevented the possibility of an arbitrator awarding damages if liability were established. It is familiar law that a party who has prevented fulfilment of a condition precedent cannot set up the fact of its non-fulfilment."

In the earlier of the last two passages quoted the only significance which appears readily attachable to the words in brackets is that no difference as to amount could arise when liability was being denied in any event, which is consistent with the quotation from Lord Sumner in the second of the two passages and with the Lord Chancellor's interpretation of Lord Dunedin's speech mentioned above.

Lord Porter (at p. 401) expressed agreement with the Lord Chancellor that the true ground of the decision in *Jureidini's* case (2), was

"the narrowness of the field of submission and the fact that no dispute had arisen on the only point submitted to arbitration."

He did not refer to the words in brackets which I have mentioned above, but must I think be taken to have agreed with them, for in *Jureidini's* case (2), a dispute as to amount had in fact arisen, and continued at least as far as the pleadings.

I will quote only one further reference to *Jureidini's* case (2), that is what was said by Lord Sumner in delivering the judgment of the Privy Council in *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*, (3) [1926] A.C. 497 at 512:

"As for *Jureidini's* case, [1915] A.C. 499, insurers pleaded the absence of an award as to quantum only as a fatal non-fulfilment of a condition to the right to sue on a policy. As they had themselves repudiated the claim in toto, it was held that they could not insist on the absence of an award. It is a case of approbation and reprobation."

I think that these authoritative expositions of the judgments in *Jureidini's* case (2), show clearly that nothing turned upon whether in fact there was a dispute or difference as to the amount of the loss because the total repudiation of liability was all pervading and prevented any approach to the stage at which a difference over amount could be a live issue. I think that in the light of what has been said by the eminent authorities quoted above the words used by Lord Dunedin –

"that clause necessarily refers to an existing difference, not a historical difference",

are to be construed in the sense, not that there had been a dispute as to amount which had been resolved before action (which does not in fact appear to have been the case, as the dispute lasted at least until trial) but in the sense that such dispute had been superseded by the total denial of liability.

This proposition is not dependant upon the repudiation of liability being of such a nature as to deny the existence of the contract of insurance ab initio. *Jureidini's* case (2), was not such a case, for the fraud and arson relied upon

would have been, if established, breaches of a particular condition of the contract of insurance. They were breaches which would not have involved a dispute as to whether there had ever been a contract, and would not therefore, under the authority of *Heyman v. Darwins Ltd.* (1), have denied effect to an arbitration clause under which both liability and amount were to be determined. It may therefore seem rather startling that an unlimited arbitration clause should survive a repudiation of a contract in a sense of not involving a denial of the contract, whereas a claim limited to determination of the amount of loss would not. That, however, is not quite the result of the decisions in principle, for the effect of *Jureidini's* case (2), is not that the arbitration clause is void, but that there is nothing to which it can be applied, while total liability is being denied. Lord Dunedin, in *Jureidini's* case (2), (at p. 535) reserved his opinion as to whether, upon a proper pleading, after liability had been decided, the arbitration clause could not still be relied upon and in *Shah v. South British Insurance Company Limited* (4), [1962] E.A. 131 (C.A.), this court gave effect to that implied opinion in a case (upon conditions similarly worded) in which in actual fact no dispute as to quantum had arisen prior to the commencement of the action. In any event the result of *Jureidini's* case (2), (as thus interpreted) is not a negation of common sense, for under the type of arbitration clause in issue in *Heyman v. Darwins Ltd.* (1), the whole matter in dispute can normally be disposed of by the arbitrator, but where the amount of loss only can be so determined, it is hardly reasonable to permit a party to a contract to say at one and the same time –

“You must go to arbitration on the amount but I am not going to pay you in any event”.

However that may be, if the interpretation of *Jureidini's* case (2), which I have derived largely from what was said in *Heyman v. Darwins Ltd.* (1), and which, with great respect, I adopt, is the correct one, it must be followed in the present case unless it is distinguishable on the facts. In my view it is not distinguishable. The arbitration clause is the same in both cases. The words “independently of all other questions” in that clause did not deter their lordships in *Jureidini's* case (2), from arriving at the conclusion they did. In both cases liability and the amount of loss (at least until trial) were disputed. As I interpret *Jureidini's* case (2), the ground of the denial of liability is immaterial, (unless it is a complete denial of loss). I can see no material point on which the two cases can be distinguished.

I am, therefore, of the opinion that the obtaining of the arbitrator's award as to the amount of loss was not a condition precedent to the action. If it was not a condition precedent, the absence of an award could not be an absolute defence to the action. The reasons which I have given for arriving at this conclusion render it unnecessary to consider the other submissions of counsel on this aspect of the case.

I turn now to the other grounds on which the learned judge held that the dismissal of the suit could be justified, namely, non-compliance with cl. 11 of the policy and the “Safe and Books” clause. As I understood Mr. Gratiaen, he resiled from the submission which he made earlier in his argument that, having pleaded by its defence that the whole contract was vitiated by fraud, the company could not rely on cl. 11 or the “Safe and Books” clause to relieve it from liability. I would observe here that the allegations of fraud which, if established, would have resulted in the contract being void ab initio, were abandoned by the company when the preliminary point as to whether the arbitration clause was a bar to the action was being argued, and before any evidence was taken.

Clause 11 of the policy reads:

“11. On the happening of any loss or damage the insured shall forthwith give notice thereof to the company, and shall within fifteen days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company

(a) a claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.

(b) particulars of all other insurances, if any.

“The insured shall also at all times at his own expense produce, procure and give to the company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the company as may be reasonably required by or on behalf of the company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

“No claim under this policy shall be payable unless the terms of this condition have been complied with.”

As I have indicated, a few days after the fire the appellant lodged a claim with the company for “approximately” Shs. 90,000/-, though the particulars attached showed the total claim to be Shs. 94,849/78, comprising Shs. 92,886/78 in respect of stock and Shs. 1,963/- in respect of furniture and fittings. The particulars were prepared by Mr. Merryweather, the company’s adjustor, from information given to him by the appellant who does not read, write or understand English. The total of Shs. 92,886/78 in respect of the stock was arrived at by taking the value of the stock at the last stocktaking on December 31, 1958, adding thereto the value of stock purchased from then until the end of May and deducting from the total the amount of sales in 1959 less a 15 per cent. deduction for profit. The net result purported to be the value of the stock in the shop at the time of the fire. There was no itemised list of the stock and no deduction was made for salvage. As the trial judge observed, it is clear that the amount of Shs. 94,849/78 was treated at the time as the maximum amount which could be claimed and that it was subject to such further check as might be available. Examinations of the remains of the goods in the shop were made in November, 1959, by Mr. Merryweather for the company and by Mr. McCrick and experienced assessor for the appellant. Mr. McCrick produced two lists of the goods he could identify and their estimated values and, after adding 10 per cent. in one list to cover unidentifiable articles, arrived at an estimate of Shs. 36,891/45.

At the time when the appellant lodged his claim he handed over to the company for verification such books of account and invoices as he had and the company had them in its possession until the middle of November, 1959. The appellant did not furnish any further details of his claim before the action was commenced. He did not inform the company of Mr. McCrick’s valuation.

Mr. K. M. Patel of Kantilal and Partners, accountants and auditors, gave evidence that his firm audited the appellant’s books and prepared balance sheets for him for the years 1956 to 1959. He himself signed the balance sheet for 1959. That shows the estimated value of the stock on June 2, 1959, to have been Shs. 95,000/-. He said that the books of account were properly kept and

maintained and that the balance sheet was correctly prepared from the books. He arrived at the value of the stock on June 2, 1959, by taking into consideration the stock as at December 31, 1958, and the subsequent purchases and sales. He checked the stock sheets of the stocktaking at the end of 1958, though not with the stock, and verified purchases by invoices.

The learned judge's reasons for his conclusion that the appellant was in default under cl. 11 were as follows:

"The plaintiff's claim was not supported by any details. In the circumstances, it probably could not be supported in full detail, but Mr. McCririck made an inspection and an itemised valuation dated November 30, 1959. I think the details of this valuation ought and should have been communicated to the defendants even though it would not substantiate the full amount of the claim which had been lodged. But the plaintiff refused to give details at a time when the contract had not been unequivocally repudiated."

It was common ground that the books of account kept by the appellant were of the kind usually kept by small Asian retailers such as the appellant was. The appellant took stock at the end of each year which is normal in that kind of business. Mr. Merryweather agreed that he would not expect daily stock sheets to be kept in that type of shop. In the absence of such stock sheets the appellant could not give details of the stock which was in the shop at the time of the fire. In those circumstances I think he did all that he could reasonably be expected to do in support of his claim. In addition to furnishing the company with his estimate of the value of the stock at the time of the fire as calculated from his accounts, he handed to the company his books of account and invoices for the purpose of verification. Under cl. 11 the company is only entitled to as particular an account of the loss and damage "as may be reasonably practicable" and to such further particulars etc. "as may be reasonably required". I agree with Mr. Gratiaen's submission that Mr. McCririck's valuation was not a document which existed to establish the appellant's claim and that it was not the appellant's duty to supply a copy to the company. The company had its own adjustor's estimate and valuation of the goods in the shop.

Mr. O'Donovan submitted that, as the appellant was able at the trial to give details of some of the stock which was in the shop, he could have reconstructed, at least partially, what quantities he had in stock. I do not think so. On the few occasions when the appellant referred in his evidence to quantities, as distinct from values, his estimates appear to have been no more than mere guesses. Such information would have been of little, if any, value to the company in assessing the amount of loss.

My conclusion, therefore, is that there was a substantial compliance with cl. 11 on the part of the appellant and that he was not in default under that clause.

The "Safe and Books" clause, which is contained in a slip gummed on to the policy, reads:

"Safe and Books Clause

"Warranted that the insured keeps and during the whole of the currency of the policy shall keep a complete set of books, accounts, and stock sheets or stock books showing a true and accurate record of all business transactions, and stock in hand, and that such books, accounts, and stock sheets or stock books shall be locked in a fireproof safe or removed to another building at night, and at all times when the premises are not actually open for business



“This warranty applies separately to each and every business or branch business.

“Transfer of goods from one premises to another shall be a business transaction within the meaning of this warranty.

“It is further warranted that said safe shall not contain explosive or other hazardous commodities.”

As to this clause the trial judge said:

“I think there was non-compliance with the book and safe warranty. Virtually no system of regular stock accounting was adopted by the plaintiff. There was no stock book and no attempt to keep a record of details of stock which had been sold. There was only a record of the amount of gross daily takings in cash which, in my opinion, is not a sufficient compliance with the warranty. It is true that in Nairobi I think the vast majority of businesses similar to the plaintiff's do not maintain a system of stock accounting which would comply with this warranty. In my personal opinion it is very doubtful that such warranties should be included in policies relating to this type of business. If, however, they are included in the policy they should be fully explained to the trader. Nevertheless, where there is such a warranty and it is not properly complied with, the trader must incur the risk that the insurance company will claim a breach of warranty. Here again, repudiation cannot excuse non-compliance with such a warranty prior to the repudiation.”

Mr. Gratiaen made a number of submissions in regard to this clause, but I find it necessary to deal with only one, namely, that there was in the circumstances of the case a sufficient compliance with the warranty on the part of the appellant. He referred us to *In re Bradley and Essex and Suffolk Accident Indemnity Society* (5), [1912] 1 K.B. 415. In that case the society refused to pay a claim on the ground of non-compliance with a condition of the policy which provided that:

“the name of every employee and the amount of wages, salary and other earnings paid to him shall be duly recorded in a proper wages book.”

The claimant who was a currier and small farmer did not keep a wages book. It was held that the sole object of the condition was to provide for the adjustment of premiums, and that compliance with the clause was not a condition precedent to liability. The following passage from the judgment of Farwell, L.J., at p. 433 is pertinent:

“The condition, if it be one, is to keep ‘a proper wages book’: that must mean, in my opinion, ‘proper under the circumstances of the case and for the business or trade of insured’. Take the case of a lodging-house keeper with one maid. I think it would be absurd to lay it down as a matter of law without evidence that it is proper or usual for such a woman to keep a wages book; and I think the same observation applies to a small farmer (even although he adds a currier's business to his farming) who employs his son as his only servant.”

In determining whether there has been a breach of the warranty I think regard must be had to the whole of the circumstances including the class of person with whom the company is contracting. Furthermore, I think the clause should be interpreted *contra proferentem*. Here we have an Asian retailer in a small way who can neither read nor write English. I have already mentioned that he kept the customary books of account for such a business as his and took stock annually which is the normal practice in that type of business. In

the proposal form which he signed he stated correctly that he kept books and that he last took stock in December, 1957. There was no reference to stock sheets. As I have understood the contention of the company, in order to comply with the clause the appellant should have kept daily, or at least, monthly stock sheets. I am satisfied that that would be impracticable and unreasonable for a retailer such as the appellant. The clause did not, in terms, require the appellant to keep daily or monthly stock sheets, but only:

“Stock Sheets or Stock Books showing a true and accurate record of . . . stock in hand.”

He did keep stock sheets of his annual stocktaking and it was possible from his books to calculate the approximate value of his stock, though not the quantities at any time. In the particular circumstances of the case, that, was, in my view, a sufficient compliance with the clause.

I am therefore of the opinion that the appellant is entitled to be indemnified by the company in respect of the loss of or damage to the stock and fittings in the shop occasioned by the fire. That brings me to the learned judge's finding as to the amount of the appellant's loss, which has been challenged by the appellant. Mr. Morgan who appeared for the company in the Supreme Court stated at the trial that the company could have applied for a stay of proceedings in order to have the difference as to the amount of the loss referred to arbitration, but that the company “did not do so purposely”. He added that he was too late to apply for a stay at that stage. The pleadings were not drafted in the way which Lord Dunedin in *Jureidini's* case (2), suggested might have entitled the court to refer the ascertainment of damage to arbitration after the issue of liability had been determined in the plaintiff's favour. The trial judge, therefore, would have been entitled to enter judgement for the amount of loss he found proved had he determined the issue of liability in the appellant's favour.

It can be accepted that the books themselves *prima facie* support the appellant's allegation as to the amount of stock in the shop. That, however, is not a complete check. Although the invoices for purchases appear to have been verified there is only the evidence of the appellant to show that the goods were actually received in the shop. It is also possible that the cash sales entered from day to day may have been entered so as to show less than the actual sales, with the result that the estimate of stock remaining would be inflated. There is no evidence that either of these expedients was resorted to unless the evidence of Mr. Merryweather and Mr. McCrick shows that something of the sort must have happened.

Both were accepted as honest witnesses, but the evidence of Mr. McCrick was preferred by the learned judge for reasons which need not be repeated, and the judge based his estimate upon the list and valuation prepared by that witness. As that resulted in a finding that the appellant (if he had succeeded on the question of liability) was entitled to not much more than one third of his claim, the learned judge, who distrusted the evidence of the appellant, must have found that, for whatever reason, the books were not accurate. Though counsel for the appellant pointed out that the allegation of fraudulent over-insurance had been abandoned, a perusal of the record of evidence does not incline me to the view that the learned judge was unjustified in his scepticism concerning the evidence of the appellant. On appeal the learned judge's finding is challenged on the ground that he misapprehended the meaning and purport of the evidence of the two expert witnesses abovementioned. It is submitted that the learned judge wrongly understood Mr. McCrick's estimate to have included all that was on the premises at the time of the fire. The interpretation relied upon by counsel is that the valuation made by Mr. McCrick was of the goods he saw, undamaged or partly damaged, or at least identifiable, but that he did not



purport to estimate the value of goods represented only by unidentifiable ash some of which may have been washed away by water.

Mr. McCririck's estimate is contained in two lists, the first, exhibit 15, totalling Shs. 30,630/50 to which was added "10 per cent. partly burned – Shs. 3,063/-" – in all Shs. 33,693/50. The second, exhibit 16, totalled Shs. 3,197/95 and there was no added percentage. Mr. Merryweather's estimate was contained in a single list, exhibit C, and totalled in the first instance Shs. 21,243/- to which was added "Plus 10 per cent. uncounted destroyed items – Shs. 2,124/-" making in all Shs. 23,367/-. The first item in the lists of both witnesses was 155 rolls of cloth, though valued at differing amounts. Both witnesses spoke in evidence of unidentifiable ash. Mr. Merryweather said there was no ash to speak of on the mezzanine floor and very little on the pavement – the bulk of what he saw was textile ash. Mr. McCririck gave a different impression. I will quote two passages of his evidence:

- "(a) Mezzanine floor was about four to five feet from ceiling. General condition gave evidence of severe fire with intense heat – a lot of naked flame. Damage was considerable – whole shop floor was covered with debris, broken glass, partially burnt goods, ash, some coagulated in lumps. In places debris was a couple of inches deep."
- "(b) On mezzanine floor there was a vast quantity of indefinable ash. I walked all over that floor several times and examined the ash at various places. I was unable to state with any degree of certainty what had been the goods which had been consumed. From the amount of ash I would say that a considerable quantity of goods had been there. I found two or three small tins and the rest was unidentifiable ash. There was also evidence of a wash by water from the mezzanine floor on to the ground floor and evidence of a wash of debris on the ground towards the street door."

I turn now to the question of the 10 per cent. additions made by the two valuers. In the first place Mr. Merryweather said:

"The valuation was on my estimate of what it would cost to get that stuff on the shelves of the shop the day before the fire. This was what I found in shop and I added 10 per cent. for untraceable destroyed elements."

In cross-examination he said:

"I proceed on basis that unidentifiable ash represented goods worth 10 per cent. of rest."

Later in cross-examination he said:

"My estimate might be 100 per cent. out. I put that as a maximum error as to value. The quantities would not be so much out. I do not concede that there could be a greater quantity. I don't think that there could have been more in the shop. I think my count was in excess of what was actually in the shop. I gave insured benefit of doubt. Subsequent careful check showed that I over-estimated the quantities."

I do not think that there can be the slightest doubt that Mr. Merryweather at least intended his estimate to cover what had been in the shop prior to the fire. Mr. McCririck said:

"I produce a list of the goods I saw and their value after the fire, exhibit 15 – Shs. 33,693/50."

Standing alone that might support the appellant's argument but a little later he said:

“I think the 10 per cent. added on to exhibit 15 is to cover unidentifiable articles. It corresponds to the 10 per cent. unidentified and destroyed articles which Merryweather allowed.”

I do not think that statement can be intended to refer to unidentifiable articles which retained some form and had not completely disintegrated into ash, and that a further unknown quantity of goods was represented by the ash present or washed away. There are in fact two items of unidentifiable goods included in exhibit 15: Item 10 is Shs. 40/- for unidentifiable cars, dolls, etc and item 43 is Shs. 600/- for three shelves of unidentifiable miscellaneous articles. Item 96 is simply “miscellaneous: Shs. 1,000/-”. All of these items were increased by the added 10 per cent. I would have no doubt on this question except for the following passage in Mr. McCririck’s evidence:

“I estimate from my inspection that on left hand side shelving there was about 230/240 rolls of cloth prior to the fire. I actually counted about 155 pieces of cotton and crepe still remaining in various stages. According to my notes I did not find actually damaged rolls of nylon.”

As, in the lists prepared by both witnesses, a valuation was attached to only 155 rolls of cloth, I would have thought that this passage provided support for the argument of counsel for the appellant, and therefore find it rather strange that he made no reference to it. The value of another 75 rolls might have been some Shs. 6,000/- and the 10 per cent. addition by Mr. McCririck was only Shs. 3,063/-. There was however no disclosure in evidence of the reason for estimating 230/240 rolls and I remain unconvinced that the argument for the appellant is sound. If, as claimed, there were goods worth over Shs. 90,000/- in the premises, on the evidence of the appellant’s own valuer something approaching Shs. 60,000/- worth must have been converted into ash and in part washed away. This seems very improbable in view of the evidence of the fire officer who described the fire as small but fierce, and said that it was extinguished with about sixty gallons of water. If the evidence of Mr. McCririck concerning his valuations is obscure in any particular, the difficulty could have been resolved by a few questions, and, the onus being on the appellant to prove his loss, if he, or his advocate, preferred to leave the matter in obscurity, he cannot complain if a court holds him strictly to what has been proved with clarity. I would therefore not interfere with the finding of the learned judge on this question.

I would, accordingly, allow the appeal with costs, set aside the judgment and decree of the Supreme Court and order that judgment be entered for the appellant for Shs. 32,000/- with costs. I would allow the costs of two counsel.

**Sir Trevor Gould JA:** I agree and have nothing to add.

**Mayers Ag JA:** I concur.

*Appeal allowed.*

For the appellant:

*EFN Gratiaen QC* (of the English Bar) *SC Gautama* and *AP Shah*  
*Satish Gautama*, Nairobi

For the respondent:

*B O’Donovan QC* and *Bhailal Patel*  
*Bhailal Patel*, Nairobi

**Thomas Lenana Mlangi Marealle v The Chagga Council**  
**[1963] 1 EA 131 (CAD)**

**Division:** Court of Appeal at Dar-Es-Salaam  
**Date of judgment:** 14 December 1962  
**Case Number:** 47/1962  
**Before:** Sir Ronald Sinclair P, Sir Trevor Gould JA, Mayers Ag JA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Tanganyika – Biron, J

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*[1] Jurisdiction – Appointment of paramount chief – Referendum calling for abolition of chief – Subsequent extinguishment of chief and chiefdom by Governor’s order – Claim for compensation – Whether court has jurisdiction to hear suit – African Chiefs Ordinance (Cap. 331), s.3, s.4, s.6 to s.21, s.22 and s.27 (T.) – African Chiefs (Chiefdom) (Amendment) (No. 2) Order, 1960, (Government Notice 135 of 1960), para. 2 (T.) – Local Government Ordinance (Cap. 335), (T.) – Native Authority Ordinance, s.2 (T.).*

**Editor’s Summary**

In 1951 the Chagga people resolved on the appointment of a paramount chief and the appellant, at the request of the respondent, accepted nomination for the post and was duly elected by the Chagga people. This necessitated his giving up his existing employment with the Government of Tanganyika but in return the emoluments and other benefits attaching to the new office were substantial. The respondent in 1959 refused to approve the appellant’s emoluments for 1960 and the Chagga people on a referendum held on the direction of the Government approved of that decision, expressing a wish for a president of the Chagga people instead of a paramount chief and recommending that the Government should terminate the appellant’s appointment. Subsequently by an order of the Governor made under s. 4 of the African Chiefs Ordinance, published in the Supplement to the Official *Gazette* of May 6, 1960, as Government Notice No. 135 of 1960, the office of the chief and the chiefdom were effectively extinguished. The appellant thereupon instituted legal proceedings in the High Court against the respondent, claiming compensation and damages and alleging that he had been constituted and installed as paramount chief of the Chagga people for the duration of his lifetime. The respondent in its defence (*inter alia*) denied that the appointment of the appellant was for his lifetime and took the preliminary point that by reason of the provision of s. 12 (4) and s. 22(1) of the African Chiefs Ordinance the court had no jurisdiction to hear the case. The High Court upheld the preliminary objection, basing its decision substantially on s. 22(1) *ibid.* which provides, *inter alia*, that “. . . a court shall not have jurisdiction to entertain any civil cause or matter instituted for the determination of any question relating to the constitution, suspension or deposition of a chief”. On appeal,

**Held –**

- (i) both s. 12 and the whole tenor of the Ordinance showed that the disputes which were removed

from the jurisdiction of the court were those relating to persons, in the sense of the persons who might be contending for constitution as chief; there was no mention anywhere in the Ordinance of the terms upon which any particular chief was to hold his appointment, of its duration, his remuneration, or upon whom fell the responsibility for paying him, and it was contrary to the reading of the Ordinance to assume that these questions were to be referred to the Governor under s. 12 (1) (a) or withdrawn from the courts under s. 12(4).

- (ii) what was withdrawn from the courts by sub-s. (4) of s. 12 *ibid.*, was any question preliminary and necessary to the ascertainment of who was to be constituted chief.

- (iii) the word “deposition” as used in s. 22(1) referred to proceedings under s. 13 and the sections following, and had no bearing upon an order made under s. 4 (4); and the words “question relating to the constitution” of a chief appearing in the same section was to be understood in relation to the powers of the Governor to constitute chiefs under the Ordinance.
- (iv) there was nothing in the Ordinance which deprived the court of jurisdiction to decide any question relating to the terms upon which the appellant held that office, including the question of whether any legal obligation on the part of the respondent arose out of the appellant’s tenure of office.
- (v) the termination of the office of a chief and the chieftom by an order made under s. 4 of the Ordinance was not a “deposition” within the meaning of s. 22 (1) of the Ordinance.

Appeal allowed; preliminary objection overruled.

December 14. The following judgments were read:

### Judgement

**Sir Trevor Gould JA:** This is an appeal from a decree of the High Court of Tanganyika at Arusha dismissing with costs a claim for “compensation and damages” on the ground that the court had no jurisdiction to entertain the suit.

The respondent (defendant in the court below) is a corporate native authority and the appellant in his plaint claimed that in the year 1951 the Chagga people resolved on the appointment of mangi mkuu (paramount chief) and the respondent requested the appellant to agree to nomination for the office; the appellant agreed and was duly elected by the Chagga people. He gave up his existing employment with the Government of Tanganyika and was constituted and installed as mangi mkuu. The emoluments and other benefits received by the appellant were substantial; they are not in dispute and it was admitted that the salary was fixed by the finance committee of the respondent. The plaint alleged that the appellant was:

“constituted and installed as mangi mkuu of the Chagga people for the duration of his lifetime”.

The plaint then alleged, and it is common ground, that the respondent at a meeting on November 13, 1959, refused to approve the appellant’s emoluments for 1960, and that on a referendum to the Chagga people that decision was approved. It will be convenient to set out para. 8 of the defence in full:

“8. The defendants admit that a general referendum to the Chagga people was held, as alleged in para. 8 of the plaint. The said referendum was held by the direction of the said Central Government following representation made by the plaintiff to Central Government and as a result thereof the Chagga people expressed a wish for a president of the Wachagga instead of a mangi mkuu, and they recommended that the said Government should terminate the plaintiff’s appointment, which was terminated accordingly by Government Notice No. 135 published in the Supplement to Official *Gazette* on May 6, 1960. Save as aforesaid none of the allegations contained in para. 8 of the plaint is admitted.”

I will refer later to Government Notice No. 135 mentioned in that passage. With reference to the allegation in the plaint that the appellant was installed “for the duration of his lifetime” the respondent said, in para. 5 of the defence:

- “5. The defendants admit that the plaintiff was elected and installed as mangi mkuu, as alleged in para. 4 of the plaint but deny that the said appointment was for the duration of the plaintiff’s lifetime. The office of mangi mkuu was not traditional, but a political appointment invited by the said Kilimanjaro Chagga Citizens Union and approved by the said Central Government until such time as the Chagga people chose to recommend to the said Government the termination of the said appointment.”

In the first paragraph of the defence objection was taken to the jurisdiction of the court by reason of the provision of s. 22 (1) and s. 12 (4) of the African Chiefs Ordinance (Cap. 331 of the Revised Laws of Tanganyika). The second paragraph embodied a contention that the plaint disclosed no cause of action. In the High Court objection to jurisdiction was taken as a preliminary point and it is the decision of the learned judge upon that question which is now under appeal. It is difficult to understand why the objection that the plaint disclosed no cause of action was not taken at the same time, for it appears logical to suppose that the court, in deciding whether it had jurisdiction, would require to know whether a cause of action existed and what it was. However, the proceedings did not take that course and there has been no decision upon whether the plaint discloses a cause of action: it would therefore be inappropriate for me to express any opinion on that subject, and I must endeavour as best I may, to ascertain whether the matters in controversy are such that the courts would be prohibited by the sections abovementioned of the African Chiefs Ordinance from entertaining or deciding them.

The area of dispute is in fact small. Apart from the question of the legal liability of the respondent to answer for what happened (and that, as I have indicated, has not yet come before the court) it is confined almost exclusively to the question whether the appellant was entitled to hold the office of mangi mkuu for life or not. On the appellant’s side, as I understand counsel’s argument, it is said that under customary law the office is held for life. For the respondent, the position is put in the portion of para. 5 of the defence set out above; it is claimed that the office of mangi mkuu is not “traditional”, which I take to be a reference to customary law. It is not clear whether the assertion is that there is no such office known to customary law or whether it is that this particular appointment was not made under customary law. I do not think it is material, for there is manifestly a dispute as to the applicability of customary law, or as to its content, or both. There is, on the other hand, no challenge by the respondent to the validity of the method whereby the appellant acquired or was installed in the office of mangi mkuu or to the fact that he was rightly so installed and remained in and performed the duties of the office for a number of years, and there is no challenge by the appellant to the fact that his tenure of the office was effectively terminated by Government Notice 135 of 1960. Under that number in the *Gazette* was published the African Chiefs (Chiefdoms) (Amendment) (No. 2) Order, 1960, made by the Governor under s. 4 of the African Chiefs Ordinance, to which I will refer hereafter as “the Ordinance”. Paragraph 2 of that Order reads:

- “2. The Schedule to the African Chiefs Ordinance, as amended from time to time, is hereby further amended by deleting from the third and fourth columns of the portion thereof relating to the Moshi District of the Northern Province the following:

‘Moshi District (excluding the Moshi Township and the Kilimanjaro Forest Reserve) . . . The Chief of the Chagga’.”

That, as will be seen later, had the effect of extinguishing the chiefdom and office of chief which the appellant had occupied. It will now be necessary to look at a number of sections of the Ordinance, for s. 12 and s. 22, upon the

construction of which the question of jurisdiction depends, must be read in the context of the whole.

In s. 3 meanings are assigned to various words and phrases, among which are “chiefs”, “chiefdom” and “customary law”:

“ ‘chief’ includes liwali, wakili, waziri or superior headman and means a person who is constituted or who is deemed to have been constituted as a chief of a chiefdom under the provisions of this Ordinance;

“ ‘chiefdom’ means an area of jurisdiction of a chief as specified in the Schedule hereto;

“ ‘customary law’ has the meaning ascribed thereto in the Local Government Ordinance;”

I have included the definition of customary law only to dispose of a matter referred to by counsel for the appellant, who informed the court that the Local Government Ordinance (Cap. 333) did not in fact ascribe any meaning to the term. I have not myself examined that very lengthy Ordinance with scrupulous care, but I have no doubt counsel is correct. Nothing, however, turns upon the meaning of the term in the present case and it is enough to say that it is a difficulty which will have to be met when it arises.

With regard to the definition of “chief” all that need be noticed is the use of the word “constituted” – a chief must either be constituted or be deemed to have been constituted. By s. 6 of the Ordinance any person who “has been recognised” as chief under the provisions of s. 2 of the Native Authority Ordinance (Cap. 72) is “deemed to have been constituted”. It is common ground between counsel that by virtue of this section the appellant was, while in office, a chief within the meaning of the Ordinance. It is not therefore necessary to do more than refer to what might at first sight appear to be an anomaly, in that s. 2 of the Native Authority Ordinance, which came into force on the same day as the Ordinance, defines “chief” as a person constituted or deemed to be constituted as such under the provisions of the Ordinance. I do not, however, think that there is in fact an anomaly as in s. 6 of the Ordinance the use of the past tense in the phrase “has been recognised” indicates that the reference intended is to recognition under the Native Authority Ordinance (Cap. 72 of the Laws of Tanganyika 1947) which preceded Cap. 72 of the Revised Laws, and in which there was a different definition. In any event, as I have said, there is no dispute that the appellant was deemed to be constituted as a chief under s. 6 of the Ordinance.

The definitions of “chief” and “chiefdom” in s. 3 of the Ordinance are linked with s. 4, which (in brief) provides that there shall be the chiefdoms set out in the third column of the Schedule to the Ordinance, that in respect of each chiefdom there shall be the office of chief as styled in the fourth column, and that the offices of chief, and the chiefdoms so set out are to be the only lawful offices of chief and chiefdoms in the territory. Sub-section (4) gives power to the Governor, by order in the *Gazette*, to add to, delete from, amend or replace all or any part of the Schedule. It is common ground that the chiefdom and office of chief which are set out above as part of para. 2 of the African Chiefs (Chiefdoms) (Amendment) (No. 2) Order, 1960, were originally included in the Schedule, were those occupied and enjoyed by the appellant, and were deleted and therefore extinguished by the Order mentioned.

Section 8 is important and I reproduce it:

“8.(1) Where for any reason the office of chief of any chiefdom is or has become vacant, the Governor may do one or other of the following things according to the prevailing circumstances, that is to say –



- (a) he may constitute as chief of the vacant chieftom any person appointed in that behalf or entitled to succeed thereto in accordance with customary law or an order made under s. 10 of this Ordinance; or
  - (b) where any person whom he is empowered to constitute as chief of such chieftom under the provisions of para. (a) of this sub-section is in his opinion unsuitable to hold such office, he may appoint as chief such person as he deems fit; or
  - (c) where there is no person entitled to succeed to such office in accordance with customary law, or in accordance with an order made under s. 10 of this Ordinance; or where no person has been appointed before the expiry of a period of three months from the date of the vacancy occurring or the expiry of such period as is usual according to customary law, or as is provided for in the abovementioned order, whichever shall first occur, he may appoint as chief such person as he deems fit.
- (2) Any person appointed by the Governor to the office of chief of any chieftom under the provisions of para. (b) or (c) of sub-s. (1) of this section shall be deemed to have been constituted as the chief thereof under the provisions of para. (a) of sub-s. (1) of this section.”

There are a number of matters to be noticed, but I will first set out s. 10, which is referred to in s. 8:

- “10. If in respect of any chieftom the Governor is satisfied that there is no or no adequate system of customary law providing for the appointment or succession to the office of chief thereof the Governor may by order make provision for such appointment or succession.”

In my opinion that section is designed to give the Governor power to provide machinery to fill the gap when there is no adequate system of customary law. The wording of s. 8 (1) (a) makes it clear that the function of the Governor is to “constitute” as chief the person entitled. In sub-para. (1) (b) and sub-para. (1) (c) the word used is “appoint” but that is brought into line with the definition of chief by s. 8 (2) which provides that the persons so appointed shall be deemed to have been constituted. The use of the word “appointed” in s. 8 (1) (a) has a different significance, in that it connotes a power of appointment by those authorised by customary law (or machinery provided under s. 10); the sub-section also envisages a customary law which may indicate who is entitled to succeed but has no provision for actual appointment. In either case there must follow the constitution by the Governor.

By s. 9 it is provided that the Governor may “appoint” a person to carry out the duties of a chief in certain circumstances and may endow that person with powers and privileges. Under sub-s. (3) however, that person is not “deemed to have been constituted a chief” but shall be deemed to be a chief for the purposes of s. 11 and s. 27 of the Ordinance. The first of those sections imposes certain duties on a chief, and the second creates offences in relation to such matters as obstructing a chief in the lawful exercise of his duties. A person appointed under s. 9 is not therefore “constituted” and is not a chief in the full sense, but is deemed to be one for limited purposes. There is a completely parallel approach in s. 14 of the Ordinance under which the Governor may appoint a person to carry out the duties of the office when a chief is suspended; such a person is deemed to be a chief for the purposes of s. 11 and s. 27.

I come now to s. 12, one of the sections relied upon by the respondent in the submission that the courts have no jurisdiction to entertain the suit. It reads:



- “12. (1) In the case of any dispute the Governor may decide –
- (a) as to whether any appointment or succession to or selection for the office of chief of a chiefdom has been made or is in accordance with customary law or an order made under s. 10 of this Ordinance, as the case may be; and
  - (b) whether the office of chief of a chiefdom is or has become vacant.
- “(2) Any decision made under the provisions of sub-s. (1) of this section shall be final and conclusive and shall not be liable to be contested in any court.
- “(3) When the Governor does not propose to exercise the power conferred by sub-s. (1) of this section the member may so certify in writing under his hand.
- “(4) Notwithstanding anything contained in any other law whereby jurisdiction in [*sic*] conferred on a Court whether such jurisdiction is original, appellate or by way of transfer, a court shall not have jurisdiction to entertain any civil cause or matter instituted to determine any question relating to the appointment of or succession by any person to the office of chief or his selection such office or to whether the office of chief of any chiefdom is or has become vacant unless the member has certified under the provisions of sub-s. (3) of this section that the Governor does not propose to exercise the powers conferred on him by sub-s. (1) of this section in respect of the office of chief concerned.
- “(5) Where the Governor has made a decision under the provisions of sub-s. (1) of this section a local court may, notwithstanding the provisions of sub-s. (4) of this section but subject to the provisions of sub-s. (2) of this section, entertain any cause or matter instituted for the recovery or delivering up of any property in connection with such appointment, succession, selection or vacancy.”

Before considering this section it is convenient to refer to the judgment in the High Court. The learned judge based his decision, in the main, upon s. 22 of the Ordinance, with which I will deal at a later stage. There are, however, two passages of the judgment which are relevant to s. 12. He said:

“The plaintiff’s claim is, to all intents and purposes, however euphemistically termed or described, a claim for damages for a breach of contract of service.”

Later, he said:

“Further, the plaintiff’s claim, which is disputed is, that he was appointed by the defendant council, and not by the Government, and also, for life. The court would, first of all, have to determine whether in fact the plaintiff was appointed by the defendant council or by the Government. In the latter case, he would immediately be non-suited. This to my mind, would constitute ‘a question relating to the appointment of any person to the office of chief’ within the meaning of s. 12 (4) of the Ordinance.”

These passages point the difficulty which arises from the fact that the question whether the plaintiff discloses any cause of action has neither been decided nor argued. Different counsel appeared for the appellant in the High Court and in this court and there may have been different emphasis in argument. In this court it was put by Mr. Oza that the cause of action was loss of office due to the wrongful acts of the respondent. What is clearly common ground, however, is that there is no dispute as to the constitution of the appellant, as a person,

in the office of chief. It is not a question of any other person claiming any right to the office or disputing the appellant's entitlement.

It will be seen at once that s. 12 follows naturally upon s. 7 and s. 8 of the Ordinance, and also that there is no reference in it to the "constitution" of a chief. That is dealt with in s. 22. Section 12(1) (b) follows on s. 7 under which the Governor may make a limited appointment of the kind already mentioned, when the office of chief becomes vacant. Nothing turns on that in this case. Section 12 (1) (a) follows upon s. 8 (1) (a) (except for the additional reference to "selection" which appears to add little) and clearly gives the Governor power to decide disputes as to the matters arising under s. 8 (1) (a) prior to the constitution of a chief by the Governor – whether or not an appointment has in fact been made or there is an entitlement to succession, and whether it is in accordance with customary law or the equivalent. There could be no applicability to s. 8 (1) (b) or (c) for they refer to appointments by the Governor himself, as to which there could hardly arise any dispute to be decided by the Governor under s. 12 (1) (a). The word "appointment" in s. 12 (4) (which is used, as in s. 8 (1) (a) in conjunction with "succession") does not relate to an appointment by the Governor but to an appointment of the nature envisaged in s. 8 (1) (a).

Though a good deal of argument was directed to sub-s. (2) and sub-s. (3) of s. 12 I do not see their relevance to the construction of sub-s. (4), which is obviously designed to remove from the jurisdiction of the courts (unless the Minister has certified under sub-s. (3)) the decision of disputes falling, within the ambit of s. 12 (1) (a), to be decided by the Governor. In my opinion both the section and the whole tenor of the Ordinance show that the disputes to be decided by the Governor are those relating to persons, in the sense of the persons who may be contending for constitution as chief. There is no mention anywhere in the Ordinance of the terms upon which any particular chief is to hold his appointment, of its duration, his remuneration, or upon whom falls the responsibility for paying him, and it is contrary to my reading of the Ordinance to assume that these questions are referred to the Governor under s. 12 (1) (a) or withdrawn from the courts under s. 12 (4). It is not necessary or correct to construe legislation limiting the jurisdiction of the courts any more widely than the wording of the enactment requires and I am unable to accede to the argument of counsel for the respondent that the phrase "relating to" in sub-s. (4) has the effect of widening its meaning to the extent of embracing terms of appointment. To my mind what is withdrawn from the courts by sub-s. (4) is any question preliminary and necessary to the ascertainment of who is to be constituted chief.

Before proceeding to s. 22 it is necessary to notice s. 13 to s. 21 of the Ordinance. These sections deal with the deposing of a chief, the manner of effecting a deposition, and possible consequences. Section 13 (1) reads:

- "13. (1) The Governor may depose any chief if after due inquiry he is satisfied that such deposition is required according to customary law or is necessary in the interests of peace, order and good government."

Section 13 (2) provides that the Governor may appoint persons to make the inquiry. Section 14 gives him power to suspend a chief during inquiry and to restrict his movements. Section 15 empowers the Governor, when a chief has been deposed, to order that he leave the area of the chiefdom, but only after a judicial inquiry which is provided for in s. 16 to s. 20. Section 21 makes disobedience to an order under s. 15 an offence.

Section 22 is as follows:

- "22. (1) Notwithstanding anything contained in any law whereby or whereunder jurisdiction is conferred

on a court and whether such jurisdiction is original, appellate or by way of transfer a court shall not have

jurisdiction to entertain any civil cause or matter instituted for the determination of any question relating to the constitution, suspension or deposition of a chief.

- “(2) Notwithstanding the provisions of sub-s. (1) of this section, a local court shall have jurisdiction to entertain any cause or matter instituted for the recovery or delivering up of any property in connection with such constitution, suspension or deposition:”

This section is complementary to s. 12, and whereas the latter takes away the courts’ jurisdiction in certain questions related to disputes which the Governor is empowered to decide, s. 22 negatives their jurisdiction in matters relating to three major decisions which, under the Ordinance, the Governor may be called upon to take. In this connection the learned judge in the High Court said:

“To entitle him to damages, it must be established that the determination of his service agreement, was wrongful, whether his services, as such, were directly determined, or whether indirectly, by reason that the office was abolished. Such determination of services, to my mind, is synonymous with, and indistinguishable from, his deposition as a chief, within the meaning of s. 22 (1) of the Ordinance.

“The court must therefore decide whether his deposition was in fact wrongful or not. This issue, to my mind, involves the ‘determination of a question relating to the deposition of a chief’ within the meaning of s. 22 (1). On this point alone, I would be constrained to hold that this court has no jurisdiction to entertain this suit.”

I must, with respect, express my disagreement with the statement in that passage that the determination of the appellant’s services by abolition of his office is synonymous with, and indistinguishable from his deposition as chief. Deposition, in the sections of the Ordinance to which I have referred, is dealt with in detail; it may only be resorted to after due inquiry and when it is required according to customary law or necessary in the interests of peace, order and good government. It may be fraught with the serious consequences of suspension, restriction of movement and banishment from a chiefdom. The chiefdom itself is not affected by the deposing of the chief; it survives, and awaits the constitution of a new chief. The appellant was not deposed: the order under s. 4 (4) of the Ordinance had the effect of extinguishing both chiefdom and office of chief. For this action by the Governor there was no “due inquiry” prescribed, and there ensued no possibility of the serious consequences I have referred to. In my judgment the word “deposition” as used in s. 22 (1) refers to proceedings under s. 13 and the following sections, and has no bearing upon an order made under s. 4 (4).

As for the other words used in s. 22, I am satisfied that a “question relating to the constitution” of a chief is to be understood in relation to the powers of the Governor to constitute chiefs under the Ordinance. It is not constitution in the sense the word might be used in relation to a country, corporation or society, but in the sense of creation. It prevents a court from inquiring into the propriety or legality of the constitution of a person as a chief by the Governor; it does not relate to the terms upon which any particular chief holds office. The third word in the section, “suspension”, has no relevance in the present case.

I have not hitherto adverted to sub-s. (5) of s. 12 or sub-s. (2) of s. 22 of the Ordinance and counsel did not before the court, or apparently in the High Court, make either of them the basis of any submission. To the extent that they indicate that the Governor is not concerned with questions of property they support the view I have indicated (through not, as yet, formulated in relation to the present case) as to the true construction of the Ordinance. The proviso

to s. 22 (2) points to what is intended to be excluded from the jurisdiction of the courts – the legality or propriety of acts of constitution, suspension or deposition. On the other hand it may be asked, if my view of the construction of the Ordinance is correct, why it was necessary to make these provisions in respect of local courts at all. I do not pretend to know the answer to that question; it could conceivably be in order to settle doubts as to the jurisdiction of local courts, which is limited by the provisions of the Local Courts Ordinance (Cap. 299). It is not necessary in the present case to determine whether the sub-section is intended to confer upon local courts an exclusive jurisdiction in the matters mentioned. I do not find in the sub-sections, particularly in the absence of any submission by counsel based on them, anything which would induce me to alter my view of the construction of the Ordinance as a whole.

Applying my view of the proper construction of the Ordinance to the present case, I find no impediment to the jurisdiction of the High Court in any matter relating to the constitution of the appellant as *mangi mkuu*, as the propriety, legality or validity of his acquisition of that office has never been in question. I find that no question arises relating to the appointment of any person to the office of chief within the meaning of s. 12 (4) of the Ordinance. I find nothing in the Ordinance which deprives the court of jurisdiction to decide any question relating to the terms upon which the appellant held that office, including the question of whether any legal obligation on the part of the respondent arose out of the appellant's tenure of the office. I find nothing in the Ordinance which deprives the court of jurisdiction to entertain and decide any question arising out of or relating to the African Chiefs (Chiefdoms) (Amendment) (No. 2) Order, 1960, made under s. 4 of the Ordinance, deleting from the Schedule the chiefdom and office of chief until then held and occupied by the appellant. The result of that order was not, in my opinion, a deposition.

I would allow the appeal with costs (certified for two counsel), set aside the decree in the High Court, and direct that the suit proceed. The appellant should have the costs of the preliminary point in the High Court (similarly certified) in any event. I should add that on the view I have taken it has not been necessary for me to consider the question, raised on appeal but not in the High Court, whether s. 12 and s. 22 of the Ordinance were *ultra vires* the legislature.

**Sir Ronald Sinclair P:** I agree and have nothing to add. There will be orders in the terms proposed by Gould, J.A.

**Mayers Ag JA:** I agree and have nothing to add.

*Appeal allowed; preliminary objection overruled.*

For the appellant:

*KA Master QC and KD Oza*

*KD Oza, Moshi*

For the respondent:

*CW Salter QC and G O'Connor*

*O'Beirne & O'Connor, Moshi*

**Telesfora Alex and Another v R**

[1963] 1 EA 140 (SCK)

**Division:** HM Supreme Court of Kenya at Nairobi  
**Date of judgment:** 4 October 1962  
**Case Number:** 115 and 116/1962  
**Before:** Rudd Ag CJ and Edmonds J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Evidence – Unnatural offence – Corroboration – Evidence of complainant identifying accused – Whether there was evidence to corroborate complainant’s evidence – Magistrate failing to warn himself of the need for corroboration – Penal Code (Cap. 24), s. 162 (a) and s. 297 (K.).*

**Editor’s Summary**

The two appellants were convicted on charges of having committed an unnatural offence and robbery and sentenced to twelve months’ imprisonment on the first count and three years’ imprisonment on the second count. They appealed against both conviction and sentence and their appeals were consolidated for hearing. The medical evidence was that the complainant had been carnally assaulted, and there was complainant’s evidence identifying the appellants as his assailants, that he was threatened with a razor blade, and that he was robbed of a Shs. 5/- note. When the appellants were arrested a Shs. 5/- note and a razor blade were found in the possession of the second appellant. Further there was evidence that there were seminal stains on the articles of clothing worn by the appellants and in the statements made to the police both the appellants had admitted that at the time of their arrest they were together with the complainant and had been with him for some time. In convicting the appellants the magistrate had failed to warn himself of the need for corroboration of the evidence of the complainant identifying the appellants as his assailants and on appeal the court had to consider whether there was evidence which, had the magistrate given himself the necessary warning, would have led him inevitably to the conclusion that the evidence of the complainant implicating the appellants was sufficiently corroborated.

**Held –**

- (i) the irresistible inference from the medical evidence, when considered in the light of the other circumstantial evidence, was that the two appellants were with the complainant at the time he was assaulted, and that they had committed both the offences with which they were charged.
- (ii) had the magistrate directed himself as to the need for corroboration he would undoubtedly have convicted the appellants on the evidence before him.

Appeals dismissed.

**Cases referred to in judgment**

**Judgment**

**Rudd Ag CJ:** read the following judgment of the court: These appeals which were consolidated for

hearing are against convictions on charges of an unnatural offence contrary to s. 162 (a) and robbery contrary to s. 297 of the Penal Code. The facts upon which the prosecution rely in support of these charges may conveniently be taken from the judgment of the learned magistrate:

“The facts alleged by the prosecution are that on the evening of June 22 last at about 10 p.m. the two accused who are young men about twenty-five years of age met a youth Adaukti s/o Kika who is seventeen years and appears very unsophisticated. Adaukti went for a walk with the two accused. Eventually they went to a field in Tononoka. He says he was

thrown to the ground. His shorts taken off and threatened with a razor blade. Each accused had connection with him. After this second accused took Shs. 5/- from the wallet in Adaukti's trousers. When they had dressed Adaukti asked for his money. He also asked to be taken back as he did not know his way. The accused asked if Adaukti knew where they could get drink. Adaukti in order to get away said he did. They left together. Shortly after this they saw a police patrol. Adaukti reported to the patrol and all went to Macupa Police Station."

In convicting the appellants, the learned magistrate failed to warn himself of the need for corroboration of the evidence of the complainant identifying the appellants as his assailants. We have therefore to consider if there is evidence which had the magistrate given himself the necessary warning would have led him inevitably to the conclusion that the evidence of the complainant implicating the appellants was sufficiently corroborated.

There is no room for doubt, having regard to the medical evidence, that the complainant was carnally assaulted, and the only question is as to whether the appellants were his assailants. Learned counsel for the Crown has invited us to find that ample evidence to implicate the appellants with certainty exists in these factors. The complainant said in evidence that he was threatened with a razor blade, and a razor blade was found in the possession of the second appellant when he was arrested. The complainant further stated that he was robbed of a Shs. 5/- note, and a Shs. 5/- note was found in the possession of the second appellant. A chief inspector of police who examined the clothing of the appellants, a pair of blue shorts in the case of the first appellant and a pair of bathing trunks in the case of the second appellant, said he saw stains which might be seminal on both garments, and that in the case of the second appellant's bathing trunks, the stains appeared to be fresh. The Government chemist confirmed that the stains on both articles of clothing were seminal.

In addition to this evidence, the unsworn statements of the appellants made in their defence at their trial must be considered. In his statement the first appellant said:

"On June 22 I was at Mwembe Tyari. I went to Tononoka. I saw complainant. I shared a bottle with him. Then we went to near the cinema. Accused 2 produced a note of Shs. 10/- to buy cigarettes, then I said let us go home. We met police. They told us to stop. Then complainant complained that we had robbed him. We were taken to police."

The second appellant said:

"I remember we were arrested as drunk with complainant. We met police who stopped us. Complainant reported indecent assault and robbery. We went to police station. We were taken to hospital and examined us."

It is to be noted that the second appellant does not deny first appellant's statement that they were both with the complainant.

The essential importance of these statements is that at the time of their arrest both appellants were with the complainant and had been with him for some time. The medical evidence is that the complainant was suffering from a recent tear in the anus which was bleeding. In our view the irresistible inference from these facts, when considered in the light of the other circumstantial evidence which we have set out, is that the two appellants were with the complainant at the time he was assaulted, and that they committed both the offences with which they were charged. It is further our view that had the learned magistrate directed himself as to the need for corroboration he would undoubtedly have convicted



on that evidence. The appeals against conviction are therefore dismissed. The sentences are severe, but we are unable to say that they are unjust. The appeals against sentence are also dismissed.

*Appeals dismissed.*

The appellants did not appear and were not represented.

For the respondent:

*OP Nagpal* (Crown Counsel, Kenya)

*The Attorney-General*, Kenya

## **Al-Jah Noman Mohamed Qadasi v Ganem Ahmed Mugahid Qadasi** [1963] 1 EA 142 (CAA)

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| <b>Division:</b>         | Court of Appeal at Aden                                    |
| <b>Date of judgment:</b> | 15 February 1963   |
| <b>Case Number:</b>      | 71/1962  |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P, Newbold JA |
| <b>Sourced by:</b>       | LawAfrica  |
| <b>Appeal from:</b>      | The Supreme Court of Aden – Le Gallais, C.J                |

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[1] *Contract – Consideration – Agreement between two parties to run a bakery – Each party in turn to run bakery for periods of six months – Capital equipment and premises provided by one party – Same party unilaterally withdraws from the agreement – Claim for specific performance and compensation by other party – Whether agreement supported by consideration – Contract Ordinance (Cap. 30), s. 3 (d) (A.) – Specific Relief Ordinance (Cap. 140), s. 21 (1) (A.).*

### **Editor’s Summary**

The appellant and the respondent had for many years prior to May 29, 1949, been running, under an agreement known as a “zam”, a bakery which they had purchased many years earlier, and on that date they renewed the agreement in writing. It was agreed that a “zam” is the name given in Aden to a type of agreement in present use there whereby two persons agree to share a business turn and turn about. The renewed agreement provided, *inter alia*, that each party would run the bakery for a period of six months, that each was bound to take over his turn on the day it was due and that if he refused to do so, the other would have the right to claim damages or compensation. The agreement also provided that in the event of either party refusing to hand over the bakery on completion of his turn, he would be liable to pay the other party a sum of Rs. 20/- per day until the bakery was handed over. On April 13, 1961, the appellant filed a suit in the Supreme Court of Aden claiming that the respondent’s zam had expired on January 4,

1961, and that the respondent had refused delivery to the appellant for his turn, and the appellant claimed a declaration that he was entitled to six months' zam and a decree for specific performance and compensation at the rate provided in the agreement. In his defence the respondent alleged that the appellant was "given" the zam as being the son-in-law and servant of the respondent and that he had broken the agreement by failing to run the bakery for about five months, necessitating expenditure on repairs and replacements, and that, therefore, he had informed the appellant that he "would not like to continue the zam". He also denied the claim for specific performance, alleging that there was no consideration for the zam agreement and that the appellant was himself in breach of the agreement and was guilty of laches. The Supreme Court held that there was no consideration to support the agreement in question and dismissed the suit on that ground. Thereupon

the appellant appealed and the respondent filed a cross-appeal contending that the decision of the Supreme Court should be affirmed on other grounds.

**Held –**

- (i) the agreement of May 29, 1949, contained reciprocal promises in that each party undertook to run the business in turn for periods of six months and thereafter to hand it over to the other.
- (ii) these promises had value in the eyes of the law for each party had an interest, with financial implications, in having the business continuously operated in order that customers would be retained and the goodwill thereby maintained; consequently.
- (iii) there was accordingly consideration sufficient to support the agreement.

Appeal allowed. Case remitted to Supreme Court for consideration of other issues.

**Cases referred to in judgment:**

- (1) *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd. and Another*, [1918] 1 K.B. 592; [1918] All E.R. Rep. 143.
- (2) *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206; [1939] 2 All E.R. 113; [1940] 2 All E.R. 445.
- (3) *Saleh Mohamed Khobani v. Mohamed Ali Turki* (1955), Aden L.R. 34.
- (4) *Gibson v. Small*, 10 E.R. 499.

February 15. The following judgments were read:

**Judgment**

**Sir Trevor Gould Ag V-P:** On May 29, 1949, the respondent and the appellant entered into an agreement in writing in the following terms:

“An Agreement has been made this date the 31st day of May 1949, between (1) Ghanem Ahmad Qadasi (herein called the first partner) and (2) Haj Noman Muhammed Qadasi (herein called the second partner).

“That both partners have mutually agreed and purchased a bakery situated in section ‘B’ Street No. 4, Sheikh Othman, on the following terms:

- 1. That each partner will run the bakery for a period of six months.
- 2. That each partner is bound to take over his turn on the day it is due, and if he refuses to do so, the other partner will have the right to claim damages or compensation.
- 3. That in the event of a partner refusing to hand over the bakery on the completion of his turn, he will be liable to pay his other partner a sum of Rs. 20/- (Rs. twenty) on every day he holds the bakery after his turn.
- 4. That the counter which is in front of the bakery as well as the licence for the bakery will be in the name of Ghanem Ahmad that this counter will not be included in the partnership. The wooden cupboard which is near the bakery will be included in the partnership.
- 5. That any expenditure incurred or any materials purchased for the bakery will be equally borne by both partners.

6. That the first turn was allotted to Ghanem Ahmad and has been completed on May 31, 1949. The second turn will be for Haj Noman and is commencing from June 1, 1949, to November 30, 1949; the third will be for Ghanem Ahmad and will be commencing from December 1, 1949, to May 31, 1959, (*sic*) and so on.

“Both parties have set their hands herein this day the 29th May, 1949:

Witness:

Not signed

L.T.I. of Ghanem Ahmad

i.e. Ahmad Ghanem

Sd.

i.e. Haj Noman Muhammed

i.e. Muhd. Abdu Haider

Not signed

i.e. Ahmed Thabit.”

It is common ground that the agreement, which was written by a third party, contains an error inasmuch as it recites that the parties had purchased a bakery; they had in fact, for many years prior to 1949, been carrying on under an arrangement similar to that embodied in the agreement of May, 1949. It appears that the original agreement had been lost and it was replaced or succeeded by the present one. The agreement constitutes what is known in Aden as a “zam” which, the court was informed, is an Arabic word meaning “turn”.

On April 13, 1961, the appellant issued a plaint in the Supreme Court of Aden claiming that the respondent’s zam had expired on January 4, 1961, and that he had refused delivery to the appellant for his turn. The appellant claimed a declaration that he was entitled to six months’ zam, a decree directing the respondent “to deliver the zam to the plaintiff of bakery”, a decree for a sum at the rate of Shs. 30/- per day (equivalent to the Rs. 20/- mentioned in the agreement) and costs. The respondent’s written statement of defence is factually in rather vague terms, but in essence alleges that the appellant was “given” the zam as being the son-in-law and servant of the respondent, and that he had broken the agreement by failing to run the bakery for about five months, necessitating expenditure on repairs and replacements. The respondent had therefore informed the appellant that he “would not like to continue the zam”, which presumably means that the respondent gave notice that he proposed to treat the agreement as terminated. Paragraph 6 of the written statement is as follows:

- “6. The plaintiff’s claim for specific performance is not maintainable in law, because (i) there was no consideration for the zam agreement, and (ii) the plaintiff had made the breaches, and (iii) the plaintiff’s claim is affected by laches.”

In his judgement in the Supreme Court the learned Chief Justice considered that the first of the matters raised in that paragraph, that of lack of consideration, was the main issue. He said:

“The main issue in the case therefore is whether or not there was any consideration for the grant of zam to the plaintiff. If there was no consideration then clearly exhibit B would not create any enforceable legal rights.”

He found that he was satisfied that no consideration moved from the plaintiff (appellant) in respect of the agreement of May, 1949, and dismissed the suit on that ground. The present appeal has been brought by the appellant against that decision.

The issue concerning consideration at the hearing in the Supreme Court and in the judgment appears to have been regarded as turning upon whether the respondent entered into the zam agreement (at its commencement) because of the relationship between the two parties, providing the premises and equipment himself, or whether the appellant contributed towards the cost of the business assets as he alleged. There was substantial conflict of evidence but the learned Chief Justice preferred that of the

respondent and found as a fact that the zam was “given gratuitously” on the appellant’s marriage, that the respondent

was the tenant of the premises, and that the appellant did not contribute towards the cost of the equipment. These questions involved the credibility of the witnesses, who were seen and heard by the learned Chief Justice, and nothing that has been urged in this court provides, in my opinion, any basis for dissenting from his findings.

To hold, however, that for those reasons there was no consideration for the agreement between the parties, is to my mind to take far too limited a view of the question. Upon almost any view it seems contrary to what is fitting for a person who has carried on a business relationship with another for over twenty years, to be told that he has no legal rights because he contributed nothing at the outset. Even though the motive of the respondent in entering into the agreement may have had its origin in the relationship of the parties, that would not prevent the creation of legal rights and obligations by an agreement which disclosed consideration on the face of it. That is, in my view, the position in the present case. The following words comprise the relevant portion of the definition of consideration in s. 3 (d) of the Contract Ordinance (Cap. 30 of the Laws of Aden, 1955):

“When, at the desire of the promisee, the promise . . . promises to do or abstain from doing, something . . . such . . . promise is called consideration for the promise.”

Section 3 (f) provides that promises which form the consideration or part of the consideration for each other are called reciprocal promises. In the agreement of May, 1949, it is necessary to go no further than para. 1 and para. 2 to see that it contains such reciprocal promises. Each undertakes to run the business in turn for six month periods and to duly hand it over to the other. These are promises having value in the eye of the law for each party has an interest, with financial implications, in having the business continuously operated in order that customers would be retained and goodwill thereby maintained. There is a further mutual promise in para. 5. Similar principles would, in my opinion, apply under the common law.

I have considered this question from the point of view of the principles governing ordinary contracts. The agreement in question is a zam and it would appear possible that terms might be implied therein by custom. For example there is no provision as to whether stock is handed over at the expiration of each turn and on what terms, no provision concerning debts incurred by the individual parties. Those questions do not arise in the present case and it has not been suggested by counsel that any such term could negative the ordinary principles of contract with regard to consideration. In his judgment the learned Chief Justice said:

“I am accordingly led to the belief that the arrangement was only to continue as long as it suited the defendant, who clearly did not intend to bind himself to pay compensation in the event of his terminating the arrangement.”

Counsel for neither party sought to draw anything from this passage, which I find rather obscure, and I cannot think that the learned Chief Justice was intending to make a finding that it was an implied term of this written contract, arising not from custom, but from the circumstance that the appellant made no contribution to the capital, that there should be a unilateral right in the respondent to bring the agreement to an end at will. If he did so intend I am unable, with respect, to agree that the inference was valid, for the case falls, in my opinion, far short of fulfilling the tests relating to the importation of implied terms into contracts laid down by Scrutton, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd. and Another* (1), [1918] 1 K.B. 592 at p. 605 or MacKinnon,

L.J., in *Shirlaw v. Southern Foundries (1926) Ltd.* (2), [1939] 2 K.B. 206 at p. 227 (the officious bystander). There was no evidence of any such term being imported into the contract by custom. The finding of the learned Chief Justice upon which he dismissed the suit was that, for lack of consideration, the appellant acquired no enforceable rights, which is a different matter: I have already indicated that in my opinion there was consideration and on that ground the appeal must succeed.

That does not conclude the matter but before proceeding further it will be convenient to say a few words concerning the contract known as the zam, about which there appears to be very little case law which is of assistance. A brief description was given by counsel for the appellant and acquiesced in by counsel for the respondent: "An agreement by which two persons agree to share a business turn and turn about". That much is of course apparent from the written agreement in this case. The type of contract is said to be due to the fact that a number of the business community live in the Yemen and come periodically to Aden. Counsel were, however, not at all agreed upon other matters such as the method of termination of a zam like the present, which contains no written provision on that subject. Mr. Sanghani's opinion was that it continued indefinitely and descended to the heirs of the parties – Mr. Nunn did not accept that position. There is no evidence in this case to indicate, what, if any, terms might be implied by custom. The only reported case which has been brought to the court's attention is *Saleh Mohamed Khobani v. Mohamed Ali Turki* (3) (1955), 2 Aden L.R. 34, in which Campbell, J., said, at p. 35:

"In my view it is impossible to say that a constructive trust has arisen here. For it cannot be said that the parties were in a fiduciary relationship; they were in a contractual relationship only. Had they been partners it might have been different, but a 'zam' has no characteristics of a partnership whatever. The parties neither share in the profits or the losses. All they do is to take turns at running the business on their own account and at their own risk."

In the present agreement the parties are referred to as partners, and in a ruling and order made in Civil Suit No. 300 of 1962, by Blandford, J., concerning a zam, the parties are referred to as partners. That is, however, only a matter of terminology, and the statements made by Campbell, J., have not been attacked. In the ruling and order abovementioned a temporary mandatory injunction for delivery of possession was granted – all that can be drawn from that is that presumably the judge would have been prepared to order specific performance. It is not stated who owned or was tenant of the particular business premises. Perhaps the paucity of case law on this subject arises from the fact (as the court was informed) that many zams contain arbitration clauses. Be that as it may, there is very little recorded information on the subject and it would seem that (unless there is anything of which Aden courts could take judicial notice) the onus would be upon any party seeking to rely upon a term not set out in the zam agreement, to establish that it was an incident of the contract by custom. As Parke, B., pointed out in *Gibson v. Small* (4), 10 E.R. 499 at p. 516–517, a trade custom may be used to annex incidents to written contracts, but is a matter of evidence and no such custom can be supposed to exist without evidence.

Basing his decision, as he did, upon the question of consideration the learned Chief Justice did not make any finding upon either of the two remaining matters of defence, founded respectively on an alleged breach of the agreement on the part of the appellant, and on laches. In his notice of cross-appeal in which the respondent contended that the judgment should be supported upon grounds other than that relied upon by the learned Chief Justice, he did not include



laches and counsel for the respondent did not attempt to argue it. That cannot therefore be regarded as a live issue. The matter of the alleged breach involves a decision upon conflicting evidence as to whether the appellant was in breach of his obligations, and if so the extent of such breach; when that question has been resolved, it will be necessary to decide whether, if there was breach, it was such as to go to the root of the contract so as to entitle the respondent to refuse further performance.

Counsel expressed their willingness to have these questions decided by this court but upon full consideration, I think the questions which remain can best be resolved by the Supreme Court. The breach complained of is that the appellant, during his last zam, closed the bakery, causing, according to the respondent's evidence, loss of custom and deterioration of implements. Two of the respondent's witnesses, however, said that while the appellant did not operate the bakery as such, he caused to be sold there bread made elsewhere. The appellant in evidence said that he did operate the bakery and that the witnesses to the contrary effect were telling lies. In his judgment the learned Chief Justice said that he would accept the evidence of the respondent in preference to that of the appellant where there was conflict and it therefore appears likely that he would have found that the appellant was, at least to some extent, in breach of para. 1 of the agreement: but that would still leave the question whether the breach was fundamental, which ought in justice to be decided by the court having knowledge of the people of Aden and the circumstances and conditions of trade and business there, and having the benefit of experience in the operation of the zam contract. I would therefore remit the whole question of the existence and extent of a breach of contract on the part of the appellant and whether (if there was a breach) it was of a kind entitling the respondent to take the action he did, to the Supreme Court to be determined by the Chief Justice.

If it were found that there was no fundamental breach it would be necessary for the Supreme Court to consider further questions which would then arise, having regard to the relief claimed. Under s. 21 (1) of the Specific Relief Ordinance (Cap. 140), the courts have a discretion to refuse to decree specific performance, and in appropriate cases, as is well known, they prefer to give compensation by way of damages. In the present case, in the light of the history of this particular zam contract, the finding of fact that the tenancy is that of the respondent, the absence of provision in the agreement for its termination, the evidence indicating a number of previous quarrels between the parties and the conduct of the parties in the litigation, it would be for the Supreme Court to decide in which way to exercise its discretion. If it decided that specific performance should not be withheld as a matter of discretion it would then have to consider whether such relief was in any event barred by any of the provisions of s. 20 of the Specific Relief Ordinance. It would of course be open to the learned Chief Justice to ask for further argument on these matters which the court would have had to consider in any event, assuming it had found that there was no fundamental breach of contract.

The question of damages, if it arises, will also be for the Supreme Court. Counsel for the appellant very fairly stated that he could not contend that the sum provided in the agreement (Rs. 20/- per day), was anything but a penalty. Damages would therefore have to be assessed in the ordinary way, the difficulty which I would anticipate being the ascertainment of how long a zam such as the present one could be expected to continue, which would probably involve a decision whether it was determinable by reasonable or customary notice. On this point it would be open to the court to receive further evidence, if tendered, as the question of damages of that type would have become an issue for the first time as an alternative to specific performance. All of the questions which I have mentioned, if they arise, are more appropriate for the consideration of the trial court than that of an appellate court.

I would, in the result, allow the appeal and set aside the decree of the Supreme Court; I would remit the case to the Supreme Court to decide whether the appellant was in breach of contract and whether, if so, it was a breach entitling the respondent to refuse (as he did) further performance. If they arise consequent upon the decision of that question it will be for the Supreme Court also to decide the subsidiary questions whether specific performance ought as a matter of discretion to be withheld, or must be as a matter of law, and the question of damages. The costs of the trial in the Supreme Court and of any further proceedings there, I would leave to the discretion of the learned Chief Justice. The costs of the appeal and those attendant upon the notice of cross-appeal I think should be dealt with together. The appeal has succeeded in that the judgment of the Supreme Court is being set aside and on the cross-appeal the respondent has succeeded to the extent of having certain questions remitted to the Supreme Court. I would order that the respondent pay to the appellant three-quarters of his costs in this court. I should add that this order is exclusive of the costs of a preliminary point which were dealt with during the hearing.

**Sir Ronald Sinclair P:** I agree. The appeal is allowed and there will be the orders for remission of the case to the Supreme Court and as to costs proposed by the learned Acting Vice-President.

**Newbold JA:** I also agree.

*Appeal allowed. Case remitted to Supreme Court for consideration of other issues.*

For the appellant:

*Westby Nunn*

*Westby Nunn & Kazi, Aden*

For the respondent:

*PK Sanghani*

*PK Sanghani, Aden*

## **Coffee Works (Mugambi) Limited v Coffee Marketing Board** [1963] 1 EA 148 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 29 November 1962                |
| <b>Case Number:</b>      | 255/1962                        |
| <b>Before:</b>           | Jones J                         |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Sale of goods – Coffee – Coffee Ordinance – Sale of Coffee to board under the Coffee Ordinance – Grader’s certificate certifying weight and grade of coffee in Uganda – Consignment railed to Mombasa – Weight in Mombasa less than that stated in certificate – Loss of weight possibly due to evaporation of*

*water – Deduction in price made for short weight – Deductions made by virtue of rules made under the Ordinance – Claim that rules are ultra vires – Coffee Industry Ordinance, 1953, s. 43 (U.) – Coffee Ordinance, 1959, s. 45 (c), s. 64 (U.) – Sale of Goods Ordinance (Cap. 214), (U.) – Coffee Industry Rules, 1953, r. 23 (U.) – Coffee (Grading and Export) Rules, 1959, r. 6, r. 7 and r. 8 (U.).*

### **Editor's Summary**

The plaintiff had sold certain quantities of cured coffee to the defendant and its predecessor under the arrangements provided by the Coffee Industry Ordinance, 1953, and the Coffee Ordinance, 1959. The coffee was graded by certified graders and weighed, packed and delivered by the plaintiff, as agent for the defendant, to the East African Railways and Harbours Administration at Mityana in Uganda, who transported the coffee to Mombasa in Kenya. By agreement it was accepted by both parties that seventeen full bags would be reckoned as one ton and the railways accepted delivery of the consignment

without checking weights. The price of the coffee was fixed by the Governor-in-Council and varied according to the grade of the coffee as fixed by certified graders employed by the defendant, and the graders issued grading certificates which included the number of the bags and weight of each consignment. When paying for the coffee the defendant deducted from the price which was payable on the basis of the grader's certificate the value of any short weights at Mombasa, and on two consignments from the plaintiff deducted a sum of approximately Shs. 238,397/71. The deductions were purported to have been made by virtue of the Rules made under the respective Coffee Ordinances (*supra*). The plaintiff brought an action for this sum and claimed that the defendant had no right to make the deductions as the Rules were either ultra vires or repugnant to the Ordinances. On the other hand the defendant argued that even if the Rules were ultra vires, it was entitled to make the deductions by virtue of either the provisions of the Sale of Goods Ordinance, the course of dealings between the parties, or the usages of the trade. At the hearing it was common ground that, in the process of transportation, processed coffee, through evaporation of water, lost weight and that the quality of the coffee could well deteriorate and that the coffee could become musty.

**Held –**

- (i) the Rules were ultra vires and repugnant to the main Ordinances as they purported to have extra territorial effect.
- (ii) the sum in question was not deductible even if the Rules were intra vires the Ordinances.
- (iii) the plaintiff had no say in the disposal or the price to be paid for the coffee; it was not a freely negotiated agreement inter parties but one governed by the provisions of the Coffee Ordinance and therefore, the deductions could not be made by virtue either of the Sale of Goods Ordinance, the ordinary course of dealings between parties or the usage of trade.

Judgment for the plaintiff.

**No cases referred to in judgment**

**Judgment**

**Jones J:** The plaintiffs are a limited company and owners of a duly licensed coffee curing works at Mityana.

The defendants are a corporate body established under the Coffee Ordinance, 1959 (No. 15). They are the successors to The Uganda Coffee Industry Board set up under the Coffee Industry Ordinance, 1953 (No. 21).

The main functions *inter alia* of the board and its predecessor were to (1) purchase and (2) export coffee.

This action arises out of dealings between the plaintiffs and The Coffee Marketing Board and its predecessors between June, 1959, and August, 1961.

There were two transactions with The Coffee Industry Board and four with The Coffee Marketing Board, which are the subject matter of the suit.

The following facts were admitted for the purpose of this case:

The two bodies bought coffee from the plaintiffs between the dates referred to in the plaint.

The coffee was graded by certified graders, weighed by the plaintiffs, packed in sealed bags and delivered by the plaintiffs, as agents of the defendants, to the East African Railways and Harbours Administration at Mityana, who acted as agents for the defendants in transporting the coffee to Mombasa.

It was also agreed, that the weighing of the bags was done by the plaintiffs, and the railways accepted delivery of the consignment without checking weights.

A rough and ready agreement subsisted between the board and the sellers that seventeen full bags would be reckoned as one ton. Shah said that spot weight checks were made by the graders from time to time, but this was denied by the board, except for one period extending over one month when a general check in all coffee curers was carried out. Be that as it may, it would appear that in the main the plaintiffs filled and weighed the bags and they were accepted by the board on the basis that seventeen full bags made a ton.

It was not denied by anyone that (1) in the process of travelling, processed coffee, through the evaporation of water, lost weight, and (2) the quality of the coffee could well deteriorate in travel, and could also become musty.

It was further agreed that the price fixed for the coffee was that fixed by the Governor-in-Council, acting on the advice of a price-fixing board. This price was published from time to time by General Notices in the *Uganda Gazette*. The prices varied according to the grade of the coffee as fixed by certified graders employed by the board. These graders issued grading certificates, which certificate included the number of bags and weight of each consignment. When paying for the coffee, the board deducted from the price which was payable on the basis of the weight and grade on the grader's certificate, at the price fixed by the General Notice, the value of any short weights at Mombasa and, if that turned out to be the case, at a lower grade, of the consignment when the coffee arrived at Mombasa.

The parties agreed that a sum amounting to Shs. 199,783/59 was deducted by the two boards from the value of the coffee at Mityana as worked out on the basis of the weight and grade certified in the grader's certificate.

There was a separate claim for the recovery of Shs. 38,614/12 paid by the plaintiffs under protest to the board, who refused to pay the entire price of a dealing in April, 1960, a sum of Shs. 1,458,022/60. The Shs. 38,614/12 was alleged to be a claim by the defendants in respect of (1) inferiority in grade and (2) the shortage in weight of the consignment at Mombasa.

The plaintiffs claimed that the defendants had no right to do so, but the defendants said they had, by virtue of Rules made under the Coffee Industry Ordinance, 1953, and the Coffee Ordinance, 1959. The plaintiffs argued that the Rules were ultra vires as (1) not coming within the scope of the enabling sections, (2) repugnant to the Ordinance. The defendants argued further that even if the Rules were ultra vires, they were entitled to make these deductions (a) by virtue of the provisions of the Sale of Goods Ordinance, or (b) the course of dealings between the parties, or (c) the usages of trade.

I will deal with the question whether the Rules were ultra vires or not, first, as that, as I see it, goes to the root of the dispute between the parties.

The rule-making section under the Coffee Industry Ordinance, 1953, was s. 43, and s. 64 under the Coffee Ordinance, 1959. There were ten subjects on which the board could make rules under the Ordinance of 1953, and eleven under the Ordinance of 1959. The secretary of the board, Mr. Downs, was asked under what sub-section, either of s. 43 of the Ordinance of 1953, or s. 64 of the Ordinance of 1959, were the board authorised to make rules, i.e. r. 6, r. 7 and r. 8 of the Coffee (Grading and Export) Rules, 1959 (Laws of Uganda, p. 504), for the deductions by the board of amounts calculated on short-weight, inferior grades, or mustiness at Mombasa.

He said he could not, and said with commendable honesty that no sub-section of either rule-giving section would appear to give them such power.

That would appear to be the end of the matter.

It could conceivably perhaps be urged, however, that the section dealing with “controlling and regulating the purchasing of unprocessed coffee” under s. 43

and “processed coffee” under s. 64 of the respective Ordinance could give them power to make rules relating to price deductions. Mr. James, however, for the defendants, did not press that point.

It will be noticed that under s. 43 of the 1953 Ordinance, rules could be made to deal with unprocessed coffee. It therefore follows that as the coffee sold in these transactions was processed coffee, no deductions could be made in respect of any rules made under s. 43 in respect of the first two consignments.

It is further clear from a study of the Rules that they are attempting to give extra-territorial effect to the Coffee Ordinance Rules. That they cannot do, and is beyond their power.

On that score alone, apart from the fact that they could not do so under the enabling section, these Rules would appear to be ultra vires.

Even if I were wrong in considering that these Rules were ultra vires, and consequently the deductions made thereunder illegal, I would still consider that these Rules relating to the deductions are repugnant to the main Ordinance, on these grounds.

Section 14 of the Coffee Ordinance, 1959, states:

- “14. (1) The Governor-in-Council shall by order published in the *Gazette* after considering the advice of the Coffee Price Committee fix the prices to be paid by the board for each type and grade of coffee purchased by the board from licensed curing works and licensed scheduled hulleries.”

From that, the price fixed by the Governor was for each type and grade purchased by the board, i.e. purchased by the board in Uganda, of the grade certified by the certified grader in Uganda in his certificate. Under r. 23 of the Coffee Industry Rules, 1953, made under the 1953 Ordinance (Laws of Uganda, 1954, p. 8), such certificate shall be final.

Under s. 50 (3) of the Coffee Ordinance, 1959 (Uganda Laws, 1959, p. 166),

“Every grading certificate shall expire on the date mentioned thereon.”

That suggests that the definitive grading test, is the Uganda grader’s certificate.

If the contention of the defendants were correct, they would be paying for the grade of coffee at Mombasa.

It is interesting to note in this connection, what Mr. Downs said about that grading. He said that under r. 8 of the Rules made under the 1959 Ordinance, the regarding was done by their licensed graders in Mombasa or an arbitrator. A little later he said:

“By our rules we are substituting the definitive test – the award of the arbitrator in Mombasa for the qualified grader in Uganda.”

This is repugnant to the main Ordinances, i.e. s. 23 of the 1953 one, in respect of the first two lots, or s. 14 of the 1959 Ordinance in respect of the last four, as they are substituting the grade of the arbitrator at Mombasa for the Uganda graders. We were not told even whether the arbitrators were licensed graders or not, which in any event does not affect the position, if my view of the law as expressed above is correct.

Furthermore, there would be another valid objection to this regarding in Mombasa. The seller in Uganda would have no locus standi in any arbitration proceedings in Mombasa, he not being a party to the proceedings. That was never envisaged by the Ordinance.

There is the further point that the grading of the coffee in Mombasa was coffee already exported and



being sold by the board to a third party, which is

something quite different. That again would be giving extra-territorial effect to these Rules, if the defendants are correct.

I would now turn to the point put forward by Mr. James for the board. He said that whether the Rules were ultra vires or not, these were contracts governed by the Sale of Goods Ordinance, and the ordinary course of dealings between the parties and the usage of trade would apply.

The contracts between the plaintiff and the boards were in my view statutory contracts.

Section 45 (c) of the Coffee Ordinance, 1959, states:

“The owner of every curing works . . . shall (c) hold all coffee purchased by . . . to the order of the board.”

The curer, the plaintiffs in this case, had no say in its disposal or the price to be paid for the coffee. It was not a freely negotiated agreement inter parties but one governed by the provisions of the Coffee Ordinance.

The position, as I see it, is that as soon as the coffee had been graded, bagged, and a certificate by the certified grader issued and an order received from the board to enrail the coffee at Mityana station, the contract was complete. Thereafter, the plaintiffs became the board's agent in despatching the goods to Mityana station. Henceforward the complete control of the coffee, the freight, insurance, etc., was the responsibility of the board.

The board complained that as they never weighed the coffee at source, they could be prejudiced and penalised. They could have had the coffee weighed at Mityana by the railway authorities, if they paid the extra fee demanded by them for that service.

From Mityana onwards they were setting in motion the machinery for the carrying out of their second function – the export of coffee, and as soon as the goods train had crossed the borders of Uganda, the coffee was exported. It follows that what was regarded in Mombasa had already been exported.

I therefore hold that the plaintiffs were entitled to be paid without deductions, the price of the coffee in accordance with the weight and grade of the coffee on the grader's certificate in Uganda, at the price fixed by the Governor under General Notices for that grade.

As for the special sum of Shs. 38,614/12 for money had and received by the defendants for the use of the plaintiffs, I accept Shah's evidence on this that he did so under protest and as a result of pressure from the board, otherwise he would not have got the Shs. 1,458,022/60 owing to him. The agreed correspondence (exhibit 1) would lend support to that.

Mr. Downs said that all the deductions made by them “were made by a verbal arrangement with the Uganda Coffee Curing Works Association”. There was nothing to show that the defendant as such was bound by these arrangements of the Association. On the contrary, Shah's evidence said he did not consider he was, and his letters (exhibit 1) prove it. I accept Shah's evidence. Mr. Downs testified that Mr. Baumanns also objected to these deductions, so it would appear that the practice was not generally an accepted custom of the trade.

I hold that:

- (1) the contracts were statutory contracts;
- (2) they were not amounts deductible under the Ordinance and the Rules, even if they were intra vires;
- (3) the Rules relating to these decoctions were ultra vires, and repugnant to the Ordinances;

(4) both the Shs. 199,783/59 and Shs. 38,614/12 were wrongfully deducted.

I therefore give judgment for the plaintiffs for those sums, with costs and interest as prayed.

The board may well have claims in respect of the broken bags, etc., in exhibit 4. They could, if they saw fit and if advised to do so, bring an action for these amounts.

*Judgment for the plaintiff.*

For the plaintiff:

*BD Dhlokia*

*Parekhji & Co., Kampala*

For the defendant:

*AI James*

*Hunter & Greig, Kampala*

**Republic v Mandi s/o Ngoda**  
**[1963] 1 EA 153 (HCT)**

|                          |                                    |
|--------------------------|------------------------------------|
| <b>Division:</b>         | High Court of Tanganyika at Arusha |
| <b>Date of judgment:</b> | 12 January 1963                    |
| <b>Case Number:</b>      | 31/1962                            |
| <b>Before:</b>           | Murphy J                           |
| <b>Sourced by:</b>       | LawAfrica                          |

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*[1] Criminal law – Murder – Insanity – Insanity not raised as defence by accused – Issue of insanity raised by prosecution at opening of trial – Whether course adopted by prosecution correct.*

**Editor's Summary**

The accused was charged with murder and at the opening of the trial his counsel intimated that the accused was prepared to plead guilty to a charge of manslaughter. The prosecution, however, declined to accept this plea on the ground that the prosecution proposed to establish that the accused was insane when the alleged offence was committed.

**Held –**

- (i) it was questionable whether, even if it is permissible for the prosecution to raise the issue of insanity in the course of a trial, it was proper for the case to be presented at the outset as one in which the only verdict asked for was that of guilty but insane.
- (ii) in the circumstances of the case the court was entitled to treat the issue of insanity as an alternative defence and to invite the assessors to consider it on balance of probabilities.

**Cases referred to in judgment:**

(1) *R. v. Price*, [1962] 3 W.L.R. 1308; [1962] 3 All E.R. 957.

(2) *Bratty v. Attorney-General for Northern Ireland*, [1961] 3 All E.R. 523.

**Judgment**

**Murphy J:** The accused is charged with murdering Omari s/o Mafeta. The case has at least one unusual feature. At the opening of the trial, Mr. Taylor, who appeared for the accused, intimated that the accused was prepared to plead guilty of manslaughter. Mr. Lane, for the Republic, declined to accept this plea, not on the ground that this was a case of murder, but on the ground that he proposed to establish that the accused was guilty but insane. In his closing address Mr. Lane departed somewhat from this position, but he commenced his opening address by saying that it was the prosecution case that the accused was probably insane when the alleged offence was committed. At that stage, therefore, the situation was that the accused was prepared to admit an offence but the prosecution was asking the court for what, in effect, is an acquittal.

I have had some doubt whether this was a proper attitude for the prosecution to adopt. In the recent English case of *R. v. Price* (1), [1962] 3 W.L.R. 1308, in which the defence was one of diminished responsibility (a defence which is at present, perhaps unfortunately, not open to an accused person in the Tanganyika courts), Lawton, J., ruled that the Crown was not entitled to invite the jury to consider the issue of insanity. In the course of his ruling, he said (at p. 1312):

“Prosecutors prosecute. They do not ask juries to return a verdict of acquittal. A trial in England is concerned with the proof of a charge; it is not an inquisition.”

Mr. Lane has referred to the remarks made obiter by Lord Denning in *Bratty v. Attorney-General for Northern Ireland* (2), [1961] 3 All E.R. 523 at p. 534. These remarks were considered in the *Price* case (1) by Lawton, J., who appears to have differed from them. The matter is not free from doubt, but it appears to me to be at least questionable whether, even if it be permissible for the prosecution to raise the issue of insanity in the course of a trial, it is proper for the case to be presented at the outset as one in which the only verdict asked for is that of guilty but insane.

Nevertheless, in the present case, in the light of the prosecution evidence as to the accused's state of mind, Mr. Taylor asked, on behalf of the accused, for a verdict of either guilty but insane or manslaughter. I therefore thought it right to treat the issue of insanity as an alternative defence to the charge of murder and I invited the assessors to consider it on a balance of probabilities.

For the Republic:

*TW Lane* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

For the accused:

*JC Taylor*

*JC Taylor*, Arusha

## **Ruby General Insurance Co Ltd v General Land and Insurance Agencies Ltd** [1963] 1 EA 154 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 17 August 1962                  |
| <b>Case Number:</b>      | 827/1961                        |
| <b>Before:</b>           | Bennett J                       |
| <b>Sourced by:</b>       | LawAfrica                       |

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[1] *Jurisdiction – Action – Claim by principal against agent for money due under a contract – Contract originally intended to be completed in Kenya – Completion in Kenya becoming impossible through act of principal – Subsequent agreement that completion should be in Uganda – Whether court has jurisdiction*

*to entertain suit – Civil Procedure Ordinance, s. 15, Explanation (3) (U.).*

### **Editor's Summary**

The plaintiff, an insurance company, appointed the defendant company its agent in Tanganyika to canvass for business, the remuneration to be by way of commission. At the time of the making of the agreement the parties contemplated that the defendant, which was resident in Tanganyika, would deal with the plaintiff through the latter's Mombasa office, which the defendant continued to do until the closing of that office by the plaintiff after which the defendant forwarded all business to the plaintiff's Kampala office and made payments by cheque to that office. In an action by the plaintiff against the defendant claiming payment of moneys alleged to be due under the contract the defendant raised a preliminary objection to the effect that the cause of action had not arisen in Uganda and that therefore the court had no jurisdiction to

entertain the suit. The plaintiff contended that the money which it was sought to recover was payable in performance of the contract at Kampala and that the case fell within s. 15 Explanation (3) of the Civil Procedure Ordinance.

**Held –**

- (i) the fact that after the closure of the plaintiff's Mombasa office the defendant forwarded all business to the plaintiff's Kampala office and made payments by cheque to that office, was cogent evidence of a course of dealing from which it could be properly inferred that the parties had agreed that Kampala was thereafter to be the place at which the defendant would complete performance of its obligations under the contract and make payments to the plaintiff; therefore,
- (ii) the court had jurisdiction to entertain the suit.

Preliminary objection overruled.

**Cases referred to in judgment**

**Judgment**

**Bennett J:** The defendant objects to the jurisdiction of the court on the ground that the cause of action did not arise in Uganda. Neither party called evidence on the preliminary issue of jurisdiction, and in the circumstances I must assume for the purpose of deciding this issue that the primary facts as set out in the plaint are true.

It appears that, by an oral agreement made in July, 1958, the plaintiff, an insurance company incorporated in India, appointed the defendant as its agent in Tanganyika to canvass for and place insurance business with the plaintiff. Upon the acceptance by the plaintiff of any proposals forwarded by the defendant, the defendant was to be liable to pay the plaintiff the premiums and stamp duty chargeable in respect thereof. The defendant was to be remunerated by commission. At the time the agreement was made it was contemplated by the parties that the defendant would deal with the plaintiff's Mombasa office. On December 31, 1958, the plaintiff's Mombasa office was closed and it is alleged that, thereafter, there was an agreement between the parties that all records of transactions and accounts between them should be transferred to the plaintiff's Kampala office, and that all payments then due or thereafter to become due from the defendant to the plaintiff should be made at the plaintiff's office at Kampala. It is also alleged that the defendant continued to forward proposals of insurance and to make payments to the plaintiff at Kampala.

Mr. Phadke for the plaintiff, contends that there was an implied agreement by the defendant to pay all amounts due and owing to the plaintiff at Kampala, and that the case falls within s. 15, Explanation (3) of the Civil Procedure Ordinance. Explanation (3) states that in suits arising out of contract the cause of action arises at any of the following places, namely:

- (i) the place where the contract was made;
- (ii) the place where the contract was to be performed or the performance thereof completed;
- (iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

Mr. Phadke contends that in the instant case the money which the plaintiff seeks to recover was payable



in performance of the contract at Kampala.

Mr. Patel, on behalf of the defendant, contends that the defendant is resident in Tanganyika; that such payments as it has made to the plaintiff have been made by cheques drawn on an Arusha bank, so that had the cheques been dishonoured the plaintiff would have had to sue at Arusha; and that the fact

that business was sent to Kampala was due to circumstances beyond the defendant's control. Mr. Patel contended that the defendant was a commission agent and that the general rule that a suit for accounts against an agent can be filed where the contract of agency was made or where the accounts are to be rendered and payment made by the agent, does not apply in the case of commission agents. He relied upon the following passage in the A.I.R. Commentaries, Vol. I (6th Edn.), p. 549:

"But the rule has been held to be inapplicable in the case of pukka adatia and commission agents. In such cases, in the absence of a specific provision to the contrary, the place of business of the agent is the place where the money is payable. The reason is that such agents are very different from ordinary agents in that they are not mere servants of the principal, but are independent factors entrusted with the goods of the principal with wide powers. And although liable to account to the principal, the accounting must necessarily be done at the place where the commission business is transacted."

It is plain that the expression "commission agent" is used in the passage cited in the restricted sense in which it is defined in Jowitt's Dictionary of English Law, p. 414, thus:

"A factor employed to sell goods delivered to him for his principal for a remuneration called factorage or commission."

This being so, the defendant is not a commission agent within the meaning of the rule referred to in the passage upon which Mr. Patel relies. Moreover, as Mr. Phadke rightly pointed out this is not a suit for accounts against an agent but is a claim for a specific sum of money alleged to be due from the agent to the principal.

It will be seen from s. 15, Explanation (3) that one of the venues in which a suit arising out of contract can be brought is the place where performance of the contract is to be completed. To quote from the A.I.R. Commentaries (6th Edn.), Vol. I, p. 543:

"Where the contract itself does not stipulate the place of performance, it is the duty of the promisor under s. 49 of the Contract Act to apply to the promisee to appoint a reasonable place for the performance of the promise. Where this has not been done, the place of performance should be determined with reference to the intention of the parties as gathered from their acts, the terms of the contract and the surrounding circumstances."

The fact that after the closure of the plaintiff's Mombasa office the defendant forwarded all business to the plaintiff's Kampala office and made payments by cheque to that office, seems to me cogent evidence of a course of dealing from which it can properly be inferred that the parties had agreed that Kampala was to be the place at which the defendant should complete performance of its obligations under the contract and make payments to the plaintiff.

I therefore hold that this court has jurisdiction to entertain the suit.

*Preliminary objection overruled.*

For the plaintiff:

*YV Phadke*

*Parekhji & Co., Kampala*

For the defendant:

*RH Patel*

*Patel & Patel, Kampala*

**Taherali Rasulbhai and another v Shaukatali Chaudhrey**  
**[1963] 1 EA 157 (SCK)**

**Division:** HM Supreme Court of Kenya at Mombasa  
**Date of judgment:** 17 September 1962  
**Case Number:** 246/1961  
**Before:** Pelly Murphy J  
**Sourced by:** LawAfrica

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*[1] Practice – Application for particulars – Claim for damages for negligence – Defendant denying negligence and pleading inevitable accident – Whether particulars of inevitable accident should be ordered – Civil Procedure (Revised) Rules, 1948, O. VI, r. 3 (K.).*

**Editor’s Summary**

The plaintiffs filed a suit for damages for negligence in connection with a motor-car accident. The defence denied negligence and pleaded, *inter alia*, that the accident was an inevitable one. The plaintiff’s advocate requested “full material particulars [of] the facts and/or matters relied upon” to support the defence of inevitable accident to which the defendants’ advocate replied stating that “the accident was an inevitable one because [the] vehicle that my client was driving skidded through no fault of his”. The plaintiffs then asked for “full particulars of the skid and the cause thereof, if any”, and on the defendant failing to supply these particulars the plaintiffs applied to the court by way of motion under O. VI, r. 3 for further and better particulars.

**Held** – that since in an action for damages for negligence the defendant may rely upon the defence of inevitable accident by merely denying negligence an additional plea of inevitable accident may be treated as an immaterial allegation and further and better particulars of the facts upon which that plea is based should not be ordered.

*Rumbold v. London County Council and Another* (1909), 25 T.L.R. 541; *Cave v. Torre* (1886), 54 L.T. 515, and *Southport Corporation v. Esso Petroleum Co. Ltd. and Another*, [1953] 2 All E.R. 1204, applied.

Application dismissed.

**Cases referred to in judgment:**

- (1) *Burns v. Cork & Bandon Ry. Co.* (1863), 13 I.C.L.R. 543.
- (2) *Rumbold v. London County Council and Another* (1909), 25 T.L.R. 541.
- (3) *Cave v. Torre* (1886), 54 L.T. 515.
- (4) *Southport Corporation v. Esso Petroleum Co. Ltd. and Another*, [1953] 2 All E.R. 1204.

(5) *Young & Co. Ltd. v. Scottish Union and National Insurance Co.* (1907), 24 T.L.R. 73.

### **Judgment**

**Pelly Murphy J:** This is a motion brought under O. VI, r. 3, by the plaintiffs in an action for damages for negligence in connection with a motor-car accident.

By his amended defence the defendant denied negligence and pleaded, *inter alia*, that the accident was an inevitable one. The plaintiffs' advocate wrote to the defendant's advocate asking for "full material particulars [of] the facts and/or matters relied upon" to support the defence of inevitable accident. In reply, the defendant's advocate wrote stating that

“the accident was an inevitable one because [the] vehicle that my client was driving skidded through no fault of his”.

The plaintiffs’ advocate wrote in reply stating that the particulars supplied were insufficient and asked for “full particulars of the skid and the cause thereof if any”. No reply was sent to this request for fuller particulars. By this motion the plaintiffs ask for an order that the defendant do provide further and better particulars of the inevitable accident alleged in the defence. The affidavit in support of the motion states that unless the particulars requested are supplied, the plaintiffs will be

“considerably handicapped in meeting any defence that may be ultimately raised at the trial”.

Mr. Suchak, for the plaintiffs, contends that the defendant’s plea that the accident was an inevitable one is an affirmative plea setting up facts to be proved in answer to the plaintiffs’ case and that particulars should therefore be ordered. He points to the precedent for a plea of inevitable accident given in Vol. 12 of Atkin’s Encyclopaedia of Court Forms and Precedents at p. 62 and to the precedent for a defence of skidding given in Bingham’s Motor Claims Cases (4th Edn.), p. 191, which, he says, show that the cause of the skid should be pleaded. He also relies on the statements in Gibb on Collisions on Land (3rd Edn.) at p. 240, that particulars may be ordered of inevitable accident, if pleaded and, at p. 243, that

“if inevitable accident is pleaded (semble) full particulars must be given”.

That somewhat qualified statement of the law is, it would seem, founded upon *Burns v. Cork & Bandon Ry. Co.* (1) (1863), 13 I.C.L.R. 543, the report of which is not available to me. At p. 245 of the same work the learned authors state:

“All the authorities point to a rule that, if inevitable accident is relied upon as a defence, particulars must be given. Whether this rule would still be upheld or not is immaterial if it is borne in mind that inevitable accident need never be pleaded if negligence is denied.”

That statement of the law is said to be founded on the case already mentioned and another Irish case.

In *Rumbold v. London County Council and Another* (2) (1909), 25 T.L.R. 541, it was held that where in an action claiming damages for negligence the defendant by his statement of defence denies negligence he may give evidence that the accident upon which the claim is based was an inevitable accident and that in such a case the defence of inevitable accident need not be specifically pleaded. In my opinion that case is good law notwithstanding the criticism of it in Terrell’s Law of Running-Down Cases (2nd Edn.), pp. 85, 86.

Mr. Ram Hira for the defendant points out that the motion asks for an order for “particulars of the inevitable accident” and that the defendant has already stated that the accident was caused by a skid. He contends that if what is now sought is particulars of what caused the skid, the defendant should not be ordered to give these further particulars. That contention is based upon the argument that the defence of inevitable accident need not be pleaded and, if pleaded, may be treated as an immaterial allegation and no particulars need be given of it because it is an immaterial allegation. If it is in fact an immaterial allegation, then the decision in *Cave v. Torre* (3) (1886), 54 L.T. 515, is authority for Mr. Hira’s proposition. In *Southport Corporation v. Esso Petroleum Co. Ltd. and Another* (4), [1953] 2 All E.R. 1204, it was held that in an action for negligence it was for the plaintiff to prove negligence and not for the defendants to prove inevitable accident. In my opinion Mr. Hira’s contention is correct.

I think that the allegation is immaterial and need not be pleaded and, if pleaded, no particulars need be given of it. The second limb of Mr. Hira's argument is that particulars of the inevitable accident have in fact been supplied by the defendant and the further information sought by the plaintiffs is not such as should be ordered to be given by way of particulars. Here, says Mr. Hira, even if the defendant thinks that he knows what caused the skid, there may, in fact, have been another cause and it would be unwise for the defendant to commit himself. The question which the plaintiffs would appear to ask is, it is submitted, one which is appropriate to an interrogatory. In my opinion Mr. Hira's objection to giving the particulars sought is justified on this ground also. In *Young & Co. Ltd. v. Scottish Union and National Insurance Company* (5) (1907), 24 T.L.R. 73, it was held that particulars as to the cause of a fire should not have been ordered. In his judgment (at p. 74) Buckley, L.J., said:

"The principle underlying particulars was that they were given in order to make the plaintiffs' case plain, while interrogatories, on the other hand, were to assist the opposite side, and they had nothing to do with particulars. If the information was obtained by answers to interrogatories, the plaintiff could defend himself on the ground of privilege, and he would not be precluded from giving evidence as to that point at the trial."

In my opinion the information which the plaintiffs seek is information to assist their own case and their proper course, if they wish before trial to ascertain the defendant's opinion as to the cause of the skid, is to deliver interrogatories to that end if, which is doubtful, an interrogatory of that nature is permissible. I do not think that the plaintiffs are entitled to the further particulars for which they ask.

For the reasons I have given the motion is dismissed with costs.

*Application dismissed.*

For the applicant/plaintiff:

*Anil Suchak*

*Anil Suchak, Mombasa*

For the respondent/defendant:

*Ram N Hira*

*Shretta & Rau, Nairobi*

## **Hersii Haji Jama v R** [1963] 1 EA 159 (SCK)

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 30 November 1962                     |
| <b>Case Number:</b>      | 801/1962                             |
| <b>Before:</b>           | Rudd Ag CJ and Goudie J              |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Criminal law – Special Districts (Administration) Ordinance – Accused charged with entering or remaining in a special district without a permit contrary to s. 17 (1) of Ordinance – Accused born at Wajir, resident at Isiolo and arrested at Marsabit – All towns situate in Northern Frontier District – Whether accused a “tribesman” within meaning of Ordinance – Special Districts (Administration) Ordinance, s. 4, s. 15 and s. 17 (K.).*

### **Editor’s Summary**

The appellant was convicted of entering or remaining in a special district contrary to s. 17 (1) of The Special Districts (Administration) Ordinance in that, not being, *inter alia*, a tribesman normally resident in the northern frontier district, was found at Marsabit in the said district without a permit. The appellant was born at Wajir in 1932, which is in the northern frontier district of the northern province and came to Isiolo which is part of the district and began to reside there from the year 1958 at the latest and did not move his

residence from the district, but was arrested at Marsabit which is in the same district. The appellant's name appeared in the tax register of the district for the years 1958 to 1961 but in December, 1961, the district commissioner removed his name from the register for 1962 and in January, 1962, wrote to the appellant informing him that he could have a permit under the Ordinance authorising him to reside in the "Isiolo District" until February 9, 1962, but that thereafter he would not renew the permit. There is no official district called the Isiolo District and it was stated in evidence by the appellant that he was informed that he would have to leave Isiolo for Wajir.

**Held** – the appellant was a "tribesman" within the meaning of s. 4 of the Ordinance and resident in the northern frontier district of the northern province, and so did not require a permit to enter or remain therein.

Appeal allowed. Conviction and sentence set aside.

### Cases referred to in judgment

### Judgment

**Rudd Ag CJ:** read the following judgment of the court: The appellant appeals from a conviction of entering or remaining in a special district contrary to s. 17 (1) of The Special Districts (Administration) Ordinance. The charge was stated in the charge sheet as follows:

"Harsii Haji Jama, on or about June 7, 1962, not being a public officer or a tribesman normally resident in the northern province and a member of a tribe *gazetted* as resident therein, nor being in possession of a valid permit to enter or remain within the said province did enter into and remain in the said province, being found present at Marsabit in the Marsabit district of the said province."

The material part of s. 17 (1) reads as follows:

"Any person who enters or remains in a district or area to which this Ordinance applies in contravention of sub-s. (1) of s. 16 of this Ordinance shall be guilty of an offence."

Section 16 (1) provides:

"No person other than a tribesman or a public officer shall enter or remain in any district or area to which this Ordinance applies, except under and in accordance with the terms and conditions of a permit issued on that behalf by a provincial commissioner or district commissioner."

"Tribesman" is defined in s. 4 as follows:

" 'Tribesman', in relation to a district or area to which this Ordinance applies, means a person who is –

- (a) normally resident in that district or area; and
- (b) a member of a tribe, or section of a tribe, the whole or part of which has been declared by the provincial commissioner, by notice in the *Gazette*, to be resident in that district or area."

The northern province consists of the northern frontier district and the Turkana district which together constitute and form the province. Both these districts have as districts been brought within the application of the Ordinance but it would appear that this appeal concerns only the northern frontier district. The charge is unsatisfactory inasmuch as it alleges that the appellant entered and remained in the Northern Province. It should have stated the particular



district into which he was alleged to have entered and remained. However, it is not necessary to decide the appeal on the basis of any defect in the charge. The real question raised in the lower court was as to whether the appellant was entitled to enter and remain in the northern frontier district without a permit on that behalf issued under the Ordinance. He was born at Wajir which is within the northern frontier district in 1932. He came to Isiolo which is part of the district and began to reside there from the year 1958 at the latest and as far as we can see from the record he never removed his residence from that district. He was arrested at Marsabit which is in the district. He appears in the tax register of the district for the years 1958, 1959, 1960 and 1961 but in December of 1961 the district commissioner appears arbitrarily to have removed or to have instructed the clerk in charge to remove his name from the register for 1962, and in January 1962 the district commissioner wrote to the appellant informing him that he could have a pass under the Ordinance authorising him to reside in the Isiolo district [*sic*] until February 9, 1962, but that thereafter the district commissioner would not renew the pass. As far as this court knows, there is no official district called the Isiolo district, but that is by the way. The appellant said in evidence that he was informed that he would have to leave Isiolo for Wajir. If this be true, the district commissioner appears entirely to have misunderstood the Ordinance since Wajir and Isiolo are both in the northern frontier district and the Ordinance has been applied to the district and not to a smaller area in the district. The appellant was entitled to remain in the district if he was a tribesman, that is to say, if he was normally resident there and a member of a tribe or a section of a tribe, the whole or part of which has been declared by the provincial commissioner by notice in the *Gazette* to be resident in that district. By Legal Notice No. 31 of 1962 dated December 30, 1961, the provincial commissioner by notice in the *Gazette* to be resident in that district. By Legal Notice No. 31 of 1962 dated December 30, 1961, the provincial commissioner, Northern Province, purported to declare the tribes specified in the first column of the Schedule contained in the Notice to be resident for the purposes of the Special District (Administration) Ordinance, in the districts specified in relation thereto in the second column of the Schedule. The first column of the Schedule then set out the names of a number of tribes which are not material to this appeal since the appellant does not belong to any of these tribes. Then followed in the first column the following words:

“Those members of the Isaak and Herti Somali tribes whose names appear on the tax registers of the district commissioner, Isiolo”

and opposite this in the second column the “Northern Frontier District”. Reference back to the definition of tribesman contained in the Ordinance will clearly show that there was no power for the provincial commissioner to declare specified individuals not to be resident in the district. If the item in the first column of the Schedule referring to members of the Isaak and Herti Somali tribes were construed according to its terms, it would follow that where a name of a member of those tribes appears in the tax registers of Isiolo that man would be a tribesman so long as he was resident in the district or area, but his wife or children would not be tribesmen and would require a permit to remain in the district. The definition empowers the provincial commissioner to declare a tribe or section of a tribe to be resident in the area. Now in the case of Somalies at least the word “section” has a meaning which is well understood for the main tribes are divided into sections which are also named. The provincial commissioner can declare that any tribe or a named section of a tribe to be resident in the district or area, either in whole or in part. When that is done any member of that tribe or of that section who is resident in the district or area is a tribesman within the meaning of the Ordinance. It is clear from the notice that the district commissioner has declared that members of the Isaak and Herti Somali tribes are resident in the northern frontier district, since Isiolo is the administrative centre for the district. If they were not so resident

their names would not appear in the poll tax registers. The appellant is a Herti, Mijertain Somali, and is therefore a Herti Somali tribesman. He was resident in Marsabit and quite clearly was entitled to the protection afforded to tribesmen under the Ordinance, at the time when the district commissioner arbitrarily removed his name from the poll tax register. Crown counsel has been unable to show that the district commissioner's order for the removal of the appellant's name from the register was legally justified in any way at all. There is power in special specified circumstance for a provincial commissioner or district commissioner to order a person to reside outside the area of his jurisdiction in accordance with s. 15 of the Ordinance. Such an order can only be made after inquiry and requires the sanction of the Governor. The provisions of s. 15 do not appear ever to have been invoked against the appellant and the provisions of this section have not been complied with. In our opinion the appellant was a tribesman, and resident in the district and so did not require a pass to enter or remain in the northern frontier district. For this reason we allow the appeal, set aside the conviction and sentence and acquit the appellant. The fine if paid must be refunded.

*Appeal allowed. Conviction and sentence set aside.*

For the appellant:

*Chandu Shah*

*Chandu Shah, Nairobi*

For the respondent:

*GA Twelftree* (Ag. Senior Crown Counsel, Kenya)

*The Attorney-General, Kenya*

## **Dorio Lucio Vincenzini v The Regional Commissioner of Income Tax** [1963] 1 EA 162 (PC)

|                          |  |
|--------------------------|--|
| <b>Division:</b>         | Privy Council  |
| <b>Date of judgment:</b> | 28 January 1963  |
| <b>Case Number:</b>      | 23/1961  |
| <b>Before:</b>           | Lord Evershed, Lord Guest and Lord Pearce  |
| <b>Sourced by:</b>       | LawAfrica  |
| <b>Appeal from:</b>      | E.A.C.A Civil Appeals Nos. 8 and 9 of 1960 on appeal from<br>H.M. Supreme Court of Kenya – Mayers, J |

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[1] *Income tax – Appeal – Non-compliance with Income Tax (Appeal to the Kenya Supreme Court) Rules 1959 – Memorandum of appeal not accompanied by copy of notice of appeal or statement of facts – Application to strike out appeal – Powers of court to strike out appeal – Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, r. 3, r. 4, r. 5, r. 6, r. 9, r. 11, r. 12 and r. 18 (K.) – East African*

*Income Tax (Management) Act, 1958, s. 11, s. 109, s. 110, s. 113 and s. 117 – Civil Procedure (Revised) Rules, 1948, O. XLI, r. 8, O. XLIX, r. 5 (K.).*

### **Editor's Summary**

The appellant had filed a memorandum of appeal in the Supreme Court of Kenya against certain assessments for income tax but had failed to lodge with the memorandum of appeal a copy of the notice of appeal and the statement of facts as required by r. 5 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959. The notice of appeal, however, was served on the respondent within the prescribed time and the appeal was duly entered in the Register of Appeals under O. XLI, r. 8, of the Civil Procedure (Revised) Rules, 1948. The respondent then applied under r. 18 (2) of the Income Tax (Appeal to Kenya Supreme Court) Rules, 1959, to have the appeal struck out on the ground that it was not properly before the court as the appellant had failed to lodge the

notice of appeal and the statement of facts with the memorandum of appeal. It was common ground that the appellant had later lodged the notice of appeal and the statement of facts. The Supreme Court proceeded to treat the respondent's application as one for the "dismissal" of the appeal and disallowed the application on the ground that the application could not be properly regarded as an "ancillary" application within the meaning of r. 18 (2). On an appeal by the respondent the Court of Appeal reversed the decision of the Supreme Court, taking the view that the respondent's application fell properly within r. 18 (1) and that the Supreme Court has authority to strike out an improperly constituted appeal under r. 18 (1). On further appeal,

**Held –**

- (i) a continued refusal by an appellant to comply with the directions enunciated by the Income Tax (Appeal to Kenya Supreme Court) Rules, 1959, could well amount to such an abuse of its process that the Supreme Court would be entitled by virtue of its inherent powers to strike out the appeal.
- (ii) the appellant's failure to comply originally with r. 5 in not lodging the notice of appeal and the statement of facts with the memorandum of appeal fell far short of such an abuse of the process of the court, particularly since the default had been remedied subsequently, and since also the respondent could not ever have been in serious doubt as to the appellant's case and could not have been embarrassed by any failure to serve a copy of the notice of appeal.
- (iii) on the facts of the case the Supreme Court had no authority to strike the appellant's appeal either under r. 18 (1) or otherwise, and accordingly the Supreme Court was justified in dismissing the respondent's application to strike out the appeal.

*A.U. v. Commissioner of Income Tax*, 2 E.A.T.C. 386, disapproved.

Appeal allowed; order of Supreme Court restored.

**Cases referred to in judgment:**

- (1) *A.T. v. Commissioner of Income Tax*, 2 E.A.T.C. 370.
- (2) *A.U. v. Commissioner of Income Tax*, 2 E.A.T.C. 386.

**Judgment**

**Lord Evershed:** This is an appeal from an order of the Court of Appeal for Eastern Africa which reversed the decision of the Supreme Court of Kenya dismissing the application of the present respondent, the Regional Commissioner of Income Tax, asking that the appeal to the Supreme Court of the present appellant against certain assessments for income tax should be struck out. But this brief introductory statement somewhat disguises the real questions which have emerged upon the hearing before their lordships and which their lordships have to determine.

The application of the regional commissioner to the Supreme Court was, upon its face, an invocation of a particular sub-rule of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, namely sub-r. (2) of r. 18 of those Rules. Mayers, J., in the Supreme Court, held that the application did not properly fall within the scope of that sub-rule and dismissed it accordingly. The Court of Appeal expressed no view upon the effect of sub-r. (2) of r. 18 but held that the regional commissioner's

application fell properly within sub-r. (1) of the same rule and, upon that view, while reversing the decision of Mayers, J., in effect referred the matter back to the Supreme Court to decide, upon the basis which the Court of Appeal had held to be applicable, what order should

be made upon the regional commissioner's application; though, as will later appear, it appears to their lordships that one inference to be drawn from the reasoning of the Court of Appeal might encourage the view that the Supreme Court should now accede to the regional commissioner's application and strike out the appellant's appeal.

In these circumstances it appeared to their lordships at an early stage of the hearing that whatever view they might take of the appeal would not greatly advance the final determination of the real issue between the appellant and the regional commissioner, namely the former's income tax liability. Whatever in the present case may be the eventual outcome, their lordships cannot help thinking that as a result of the regional commissioner's application (in the form which it took) and the orders of the Supreme Court, the Court of Appeal and the Board thereon, the determination of the appellant's tax liability has been unhappily and unnecessarily postponed.

The true question involved in the present proceedings is that of the appellant's tax liability. The appellant was in the year 1959 assessed for income tax for certain sums in respect of certain tax years. He objected to the assessments, as he was entitled to do by virtue of s. 109 of the East African Income Tax (Management) Act, 1958; but the regional commissioner before whom the objection came confirmed the assessments and, pursuant to s. 110 (3) (b) of the enactment, sent to the appellant written notice of his confirmation.

It is now necessary to make certain references to other sections of the enactment and to the rules made thereunder.

By s. 11 (1) it is provided that any person who has given a valid notice of objection to an assessment and has been served with a notice by the commissioner under the previous section may appeal to a judge upon giving notice of appeal in writing to the commissioner within forty-five days after the service upon him of the notice under s. 110. Sub-section (3) of the same section makes provision for a person who fails to give a notice of appeal within the relevant period to apply to the judge for an extension of time in which to give such notice and the sub-section goes on to provide that extension may be granted but, as Mr. Heyworth Talbot pointed out to us, upon somewhat strict terms including in certain cases the requirement that the taxpayer shall deposit with the commissioner the whole or such part as the commissioner may require of the assessed tax which is unpaid and in regard to which he wishes to appeal.

Section 113 provides that upon every appeal to a judge under s. 111 the appellant shall appear before the judge either in person or by advocate on the day and time fixed for the hearing, subject only to a proviso that if it should be proved to the satisfaction of the judge that owing to absence of the appellant from the territories, sickness, or other reasonable cause he is prevented from so attending, the judge may postpone the hearing of the appeal as he thinks necessary.

It is to be observed that the section does not in terms make any provision for what should happen in the event of the appellant not appearing and the case not being within the proviso. It will, however, be seen that this matter is picked up by the rules.

It is also to be noted that by another paragraph of s. 113 it is provided that the appeal shall be heard in camera unless the judge on the application of the person assessed otherwise directs.

By s. 117 the appropriate authority is given power to make rules governing appeals under this part of the Act (other than appeals to a local committee). Mr. Heyworth Talbot referred also to s. 118 and s. 119.

Their lordships do not think it necessary to cite from these sections but they are directed to the time within which payment of assessed taxes is to be made. Broadly speaking,

the tax is payable in two instalments and upon notice of objection to the assessment the taxpayer is still generally liable to pay the first of the instalments. The point of the reference is that, as Mr. Heyworth Talbot pointed out, a taxpayer who appeals and who is not scrupulous in observing the times limited under the Act and the Rules may in effect successfully postpone for a considerable period the payment of the balance of his assessed tax. Mr. Heyworth Talbot's point was that, since under the Act the pendency of an appeal did have the effect to a substantial extent of postponing the liability to pay the assessed tax, therefore a taxpayer who invoked the procedure for an appeal should not be allowed, by any failure to comply strictly with his obligations in that respect, to postpone unduly the payment of his tax.

Their lordships now turn to the Rules of 1959 to which their references must inevitably be considerable. As their lordships have already pointed out the Rules are silent in regard to the requirement in the Act of giving forty-five days' notice to the commissioner. Rule 3 (1) so far as relevant provides as follows:

"Every appeal to a judge under the Act shall be preferred in the form of a memorandum of appeal and shall be presented to the registrar within seventy-five days after the date of service upon the appellant of –

(a) the confirming notice . . ."

There is a proviso to the sub-rule to the effect that if a judge is satisfied for reasons there stated that the appellant was prevented from presenting the memorandum within the period named he can extend the period within which such memorandum shall be presented. Rule 4 provides for the character and contents of the memorandum which include numbered grounds for the appeal. Rule 5 is of importance and reads as follows:

"5. The memorandum of appeal shall be accompanied by –

(a) a copy of the confirming notice, . . .; and

(b) a copy of the notice of appeal; and

(c) a statement, signed by the appellant or his advocate, setting out the facts upon which the appeal is based and referring to any documentary or other evidence which it is proposed to adduce at the hearing of the appeal."

Rule 6 provides that where a memorandum of appeal and the documents referred to in r. 5 are lodged and the filing and service fees paid, the registrar shall then enter the appeal in accordance with r. 8 of O. XLI of the Civil Procedure (Revised) Rules, 1948. Their lordships here note that by O. XLI of the Civil Procedure Rules it is provided that "where a memorandum of appeal [*sic*] is lodged" then the appeal is to be entered in a book called The Register of Appeals.

Rule 9 provides that the registrar shall give specified notice in writing to the parties of the date and place fixed for the hearing of the appeal. Rule 11 may be said to pick up the provisions of s. 113 of the Act requiring that upon the appeal coming on for hearing the appellant must appear: for by that rule it is provided that if the appellant does not appear on the day originally fixed or the adjourned date then his appeal may be "dismissed".

Rule 12 is of importance since it is the only other provision in the Rules for the "dismissal" of an appeal.

"12. Where on the day fixed, or on any day to which the hearing may be adjourned, it is found that the memorandum of appeal and the documents referred to in r. 5 of these Rules have not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum



required to defray the cost of serving the same the court may make an order that the appeal be dismissed.”

It is to be noted that the penalty of having an appeal dismissed does not arise through mere failure on the appellant’s part to send with his memorandum of appeal the other documents referred to in r. 5 but does arise where he has failed to deposit the necessary fees within the time therein referred to.

Finally, their lordships set out in full r. 18:

- “18. (1) The authority and jurisdiction of the court under these Rules may be exercised by the court in chambers.
- (2) Ancillary applications to a judge, if not made at the hearing, shall be made by summons in chambers intituled in the matter of the appeal, supported by affidavit.
- (3) If no appeal is pending, the summons in chambers shall be intituled in the matter of the intended appeal.”

It is only necessary to add that by r. 21 it is provided that the Civil Procedure Rules in regard to a number of matters there stated including the enlargement of time shall to the extent to which such rules are not inconsistent with the Act or these rules apply to an appeal to a judge under the Act. Their lordships note accordingly that by O. XLIX, r. 5, of the Civil Procedure Rules it is provided that:

“where a limited time has been fixed for doing an act . . . the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require”.

Mr. Dingle Foot put in the forefront of his argument the submission that if the effect of any of the income tax rules was to derogate from the taxpayer’s right of appeal conferred by the Income Tax (Management) Act, 1958, such rules would be ultra vires; and he cited authorities in support of his submission. As a matter of general principle their lordships have no hesitation in accepting this submission. On the other hand their lordships are equally clearly of opinion that the rule making power conferred by s. 117 of the Act must authorise the making of rules designed to make effective the statutory provisions in regard to income tax and particularly in regard to appeals from assessment. Mr. Dingle Foot indeed accepted the view that such rules, if and so far as they went beyond the strict language of the enactment, would be effective as directions designed to regulate appeals; and he also, as their lordships understood, did not contest the proposition that a taxpayer would not by resort to his rights of appeal be permitted by the court to abuse the court’s process and render the legislation practically ineffective. Their lordships therefore accept the proposition put forward by Mr. Heyworth Talbot that continued refusal by a taxpayer to comply with the directions stipulated by the Rules could and ultimately would amount to such an abuse of its process that the court would be entitled by virtue of its inherent powers to strike out the taxpayer’s appeal or dismiss it; and in this connection their Lordships have in mind the point made by Mr. Heyworth Talbot that by virtue of the Income Tax Act and Rules the pendency of an appeal has or may have the effect of postponing, until determination of the appeal, the taxpayer’s obligation to pay a substantial part of his assessed tax which is the subject of the appeal.

Their lordships now return to the facts of the present case. The regional commissioner’s notices confirming the appellant’s assessments were dated July 16, 1959. It is not in doubt that the appellant gave to the regional commissioner notice of appeal within the period of forty-five days specified by s. 111 of the Income Tax (Management) Act. It is also not in doubt that the appellant

presented to the registrar his memorandum of appeal within the period of seventy-five days after service upon him of the notice of confirmation pursuant to r. 3 of the Income Tax Rules; and that such memorandum in all respects complied with the requirements of r. 4. (As there was in fact more than one assessment in question, and therefore, strictly, more than one appeal, the appellant presented contemporaneously two memoranda of appeal: but for simplicity their lordships will treat the case as though there was but one memorandum). Thereupon it appears that the registrar (who may have been conscious in this respect of the divergence in language between r. 6 of the Income Tax Rules and r. 8 of O. XLI of the Civil Procedure Rules) proceeded to enter the appellant's appeal in the register of appeals. But though it also appears that the appellant paid the requisite filing and service fees, there is no doubt that he failed in accordance with r. 5 of the Income Tax Rules to lodge with his memorandum of appeal either a copy of his notice of appeal or of the statement required by para. (c) of the last-mentioned rule.

At this stage their lordships make two observations. First, as it seems to them, the registrar having entered the appellant's appeal in the register of appeals that appeal became an effective appeal and could not fairly be described, within the meaning of the Rules, as "an intended appeal" only. Second, neither of the two rules which alone provided for summary dismissal of the appeal has ever been applicable, namely r. 11 providing for the case of the non-appearance of the appellant on the day fixed for the appeal, nor r. 12 directed to the case where the absence of service of the memorandum of appeal and the other documents specified in r. 5 is attributable to the appellant's failure to deposit the necessary service fees.

The next event was the commissioner's summons dated November 9, 1959 (that is, some thirty-three days after the date of the appellant's memorandum of appeal). The summons bore the heading or title "Rule 18 (2) Income Tax (Appeal to the Supreme Court) Rules 1959" and asked (simpliciter) that the appellant's appeal be struck out on the ground that it was not properly before the court. The summons was supported by affidavit evidence to the effect that the memorandum of appeal was not accompanied by a copy of the notice of appeal and by a statement as respectively required by r. 5 of the Income Tax Rules. Their lordships cannot at this point forbear from observing that, as already indicated, the original notice of appeal had, admittedly, been duly served upon the commissioner; that the appellant's grounds of appeal were stated in his memorandum; and that the commissioner had himself already adjudicated upon the appellant's objections to his assessments.

The summons came before Mayers, J., sitting in the Supreme Court on December 17, 1959. As appears from the record of his ruling, that learned judge felt that, having regard to two East African cases Nos. 51 and 52 (to which their lordships will later make some reference) he could not properly hold that the court had no power at the hearing of an appeal to dismiss it on account of non-compliance with the Income Tax Rules; but he proceeded to treat the commissioner's application as one for "the dismissal" of the appeal under r. 18 (2) of the Rules and decided that the application could not properly be regarded as an "ancillary" application within the meaning of that sub-rule. He accordingly dismissed the application.

Their lordships feel bound to observe that, at any rate in terms, the commissioner's application was not an application to "dismiss" the appeal. Had it been so framed, their lordships would respectfully agree entirely with Mayers, J., that such an application could not properly be called an "ancillary" application according to ordinary sense of that epithet. Their lordships would, moreover, be of opinion that since the Rules had made express provision for "dismissal" of an appeal on the grounds specified in r. 11 and r. 12 (assuming, as their

lordships have not now to decide, that such rules, and particularly the latter of them, are *intra vires*), it would not be possible to imply into the rules a third ground for dismissal not expressly provided for.

But the commissioner's application was not that the appeal should be dismissed; but that it should be struck out. There is, or may be, as their lordships apprehend, a substantial difference between the effect of "striking out" an appeal and "dismissing" it. Their lordships were not, however, informed whether, according to the law of Kenya, an appellant whose appeal had been "struck out" (as distinct from "dismissed") would be able to re-litigate his appeal; and it may well be that, having regard to the passage of time, the effect of striking out the appellant's appeal in the present case would not be materially different from the effect of its dismissal. Nevertheless, in considering the true scope of r. 18 (2) their lordships have thought it necessary to point out – and they return to the matter hereafter – that the commissioner's application was not in fact for the dismissal of the appellant's appeal but that it should be struck out.

The commissioner appealed to the Court of Appeal for Eastern Africa against the decision of Mayers, J., and that appeal was allowed on January 27, 1961. The reasons for the Court of Appeal's decision were expressed by O'Connor, P., on February 18, 1961. It is to be noted that in the course of his reasons the learned president observed that although the appellant had failed when lodging his memorandum of appeal to lodge also the other documents required by r. 5 of the Income Tax Rules, "these requirements were later fulfilled". The learned president also expressed the view that, in the circumstances, the registrar should not have entered the appeal in the register of appeals – though this error on the part of the registrar (if error it was) cannot fairly be laid at the door of the appellant.

After referring to the relevant parts of the Income Tax (Management) Act and the Rules made thereunder the learned president proceeded to express the view that the Supreme Court has an inherent power, which may be invoked under r. 18 (1) of the Income Tax Rules, to strike out an appeal which had not been properly constituted under the Rules. He concluded his reasons as follows:

"In our view, the Supreme Court has authority to strike out an improperly constituted appeal under sub-r. (1) of r. 18, and that authority may be exercised upon a summons in chambers before the date, if any, fixed for the hearing. Whether and how, the court exercises that authority in the present case are matters for the Supreme Court and not for us.

"On the view which we take of sub-r. (1), it is unnecessary to consider sub-r. (2) of r. 18."

It will be observed that the Court of Appeal, in allowing the commissioner's appeal, based their conclusions upon the view that the commissioner's application fell properly within the scope of r. 18 (1) and expressed no view in regard to the scope or effect of r. 18 (2) although the commissioner's application had, *ex facie*, been an application expressly made under the latter sub-rule.

As they have already observed, their lordships accept the view intimated by the Court of Appeal that there must be in the Supreme Court of Kenya an inherent power to prevent an abuse of the court's process on the part of an appellant who, while invoking his statutory right to appeal under the Income Tax (Management) Act, persistently refuses to comply with the directions enunciated by the Rules; though their lordships for their part would not derive such power from r. 18 (1) of the Rules but from the Court's general inherent jurisdiction. In this respect their lordships' view is supported by the first of the East African cases earlier mentioned, *A.T. v. The Commissioner of Income Tax* (1), 2 E.A.T.C. 370, before MacDuff, J., in the Supreme Court of Kenya. In that case it is plain that the appellant had resorted to every kind

of device to postpone the final determination of his tax liability. None-the-less, the court was of opinion that the appellant's behaviour, however reprehensible, did not amount to such an abuse of the court's process as would justify the court in striking out his appeal.

In the second case, *A.U. v. The Commissioner of Income Tax (Uganda)* (2), 2 E.A.T.C. 386, the learned judge Keatinge, J., had "dismissed" the appellant's appeal. The report is extremely short and the judgment expressed (according to the report) in a single sentence. In the circumstances, it seems to their lordships that the case was not, in all probability, fully argued; but if the report fairly represents the learned judge's conclusion, their lordships feel bound to say that they cannot accept it.

As their lordships have already observed, they fully accept the view that a persistent refusal by an appellant under the Income Tax (Management) Act to observe the procedural rules may well amount to such an abuse of the Court's process as would justify an order by the court striking out such an appeal. But in their lordships' opinion the failure of the present appellant to comply originally with the terms of r. 5 of the Income Tax Rules falls far short of such an abuse – particularly since (as appears clearly from O'Connor, P.'s, reasons for the judgment of the Court of Appeal) such default had since been remedied – and since also, as their lordships think, the commissioner in the present case cannot ever have been in serious doubt in regard to the appellant's case as he certainly could not have been embarrassed by any failure to serve a copy of the appellant's notice of appeal. In the circumstances, their lordships are unable to agree with the Court of Appeal's conclusion that there had been made out on the facts of the present case, either under r. 18 (1) or otherwise, any authority for the Supreme Court to strike out the appellant's appeal. Although therefore their lordships, as they have already stated, think that Mayers, J., should not have regarded the commissioner's application as being, in strictness, one to dismiss the appellant's appeal, they think that, upon the facts as they appear to their lordships, he was justified in dismissing the commissioner's application and that his order should be restored accordingly.

According to the information given to their lordships by Mr. Heyworth Talbot as a result of his reference to his clients in Kenya, the commissioner will, upon allowance of the present appeal, now seek to raise as a preliminary question upon the appeal the appellant's failure properly to comply with the Rules. Their lordships do not wish in any way to embarrass the Supreme Court upon the hearing of the appellant's appeal; but if, as stated by O'Connor, P., the fact is that the appellant's previous failure to comply with the terms of r. 5 of the Income Tax Appeal Rules has now been practically made good, their lordships venture to express the hope that (subject to any order as to costs unnecessarily thrown away) the Supreme Court will now give such directions as will enable the appellant's appeal to be disposed of at the earliest practicable date.

For the reasons stated, their lordships will in the present case humbly advise Her Majesty that the appeal should be allowed. In the circumstances, their lordships think that the commissioner must pay the appellant's costs before the Board and in the courts below.

*Appeal allowed; order of the Supreme Court restored.*

For the appellant:

*Dingle Foot QC, Peter Rowland and Kenneth Potter* (all of the English Bar)  
*TL Wilson & Co, London*

For the respondent:

*F Heyworth Talbot QC and H Major Allen (both of the English Bar)*  
*Charles Russell & Co, London*

**Njoroge s/o Kameu v R**  
**[1963] 1 EA 170 (SCK)**

**Division:** HM Supreme Court of Kenya at Nairobi  
**Date of judgment:** 10 October 1962  
**Case Number:** 627/1962  
**Before:** Rudd Ag CJ and Edmonds J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Illegal movement of stock – Particulars of charge – Charge alleging movement ‘from place to place’ – Whether omission to give particulars of movement fatal to conviction – Animal Diseases Ordinance (Cap. 213) s. 5, (K.) – Criminal Procedure Code (Cap. 27), s. 381 (K.).*

**Editor’s Summary**

The appellant was convicted of moving stock without a permit contrary to s. 5 (1) (a) of the Animal Diseases Ordinance. The particulars of the charge stated that the appellant was found moving cattle “from place to place within an infected area” and in answer to the charge the appellant had said that he had moved cattle within the infected area from the place where he had bought them to another place without a permit from a veterinary officer. On appeal the grounds of appeal were that the charge did not disclose an offence as full particulars regarding the movement of cattle were not given and that the appellant’s plea was not an unequivocal admission of guilt.

**Held –**

- (i) the legislature did not intend to make all movement of cattle within an infected area without a permit an offence, and accordingly the charge should contain reasonable particulars which, if proved, would be sufficient to establish movement from place to place.
- (ii) an omission to give particulars of movement of cattle will not necessarily be fatal to a conviction under the section, as such omission could be cured by the contents of the plea of an accused person and in the instant case the omission to give particulars did not result in prejudice to the accused and no injustice had been occasioned.
- (iii) the appellant had admitted to carrying out or being in the course of carrying out a movement of stock from the place where he had bought them to another place and the appellant intended to admit that he had no permit from anyone connected with the veterinary department; accordingly the appellant clearly admitted offence under s. 5 (1) (a) of the Animal Diseases Ordinance.

Appeal dismissed.

## **Cases referred to in judgment**

### **Judgment**

**Rudd Ag CJ:** read the following judgment of the court:

The appellant appeals against his conviction and sentence on a charge of moving stock without a permit, contrary to s. 5 (1) (a) of the Animal Diseases Ordinance, Cap. 213 of the Laws of Kenya. In the petition of appeal two grounds were taken on behalf of the appellant, first, that the charge does not disclose an offence, and secondly, and in the alternative, that the appellant's plea was not an unequivocal admission of guilt.

In regard to the first ground of appeal, sub-s. (1) of s. 5 of the Animal Diseases Ordinance contains provisions applicable to all areas declared under s. 4 to be infected areas, the contravention of any one of which is made an offence under sub-s. (2) of s. 5. Paragraph (a) of sub-s. (1) makes this provision:

“(a) No stock shall be moved from or into any such area or from place to place within such area without the written permission of the director, or the veterinary officer or inspector in charge of such area.”

The particulars of the charge against the appellant are as follows:

“Njoroge s/o Kameu. On June 24, 1962, at about 4.00 p.m. at Saigori in the Ngong Area of the Kajiado district of the Southern Province, you were found to be moving nine head of cattle from place to place within an infected area without written permission of the director or the veterinary officer or inspector in charge of such area, to wit the Masai Native Land Unit which has been declared an infected area vide Proclamation No. 57/35.”

The contention for the appellant is that it is not sufficient in the particulars of a charge under this sub-section to state the movement of cattle as being merely “from place to place” as this does not give sufficient information to an accused person to enable him to know the particulars of the case he has to meet. It is necessary, so it is contended, to name the places from and to which the accused is alleged to have moved or to have been in the course of moving cattle.

We cannot accept that the legislature intended to make all movement within an infected area without a permit an offence. It would be carrying construction to an absurdity to imply in the provisions of the sub-section the necessity of obtaining a permit every time a cattle owner required, e.g. to move his cattle from his boma to water. There are other instances which come to mind where ordinary routine or domestic movement cannot have been intended by the legislature to require formal written authorisation. This being the case we think it necessary that the charge should contain reasonable particulars which, if proved, would be sufficient to establish movement from place to place in the sense which we have indicated. These particulars might vary according to the circumstances and should be reasonable in regard to the circumstances. For example, sometimes the prosecution would be in a position to allege that the stock had been moved from one place, such as a farm or specified locality to another similar named place. In other cases it might be enough to allege that the stock had been moved into such a named place from an unspecified place outside.

The omission to give such particulars, however, will not necessarily be fatal to a conviction, as such omission could be cured by the contents of the plea of an accused person. In the case before us the appellant, in answer to the charge, said:

“I agree that I moved nine head of cattle within the infected area without a permit from the veterinary officer.”

and in mitigation of sentence he added these words:

“When I went to buy the stock I did not know that they had disease. I did not go to steal I went to trade. I will not come back again. I understand that I could have spread P.P. (Bovine pleuro pneumonia).”

It is quite clear, from these words, that the appellant admitted to carrying out or being in the course of carrying out a movement of stock from the place where he had bought them to another place, a movement which cannot be protected as being routine or domestic. We think, therefore, that the appellant clearly admitted an offence under para. (a) of sub-s. (1) of s. 5 of the Ordinance, and the omission to give full particulars in the charge did not result in prejudice to him and no injustice has been occasioned. It would, therefore, be proper for us to invoke the provisions of s. 382 of the Criminal Procedure Code.



As to the appellant's second ground of appeal, namely, that his plea was not an unequivocal admission of guilt, this is based on the appellant's admission only of having no written permit from the veterinary officer. It is argued that there is no admission of having no permit from the director or inspector in charge of the area and that, in the absence of such an admission the plea cannot be said to admit all the ingredients of an offence contrary to para. (a). This submission exhibits all the signs of being merely specious. It would be a good submission if there were in fact any suggestion that the appellant had a valid permit, but there is no suggestion at all that the appellant had any permit or permission for the movement of the stock. We think that the appellant intended to admit that he had no permit whatever from anyone connected with the veterinary department. If he had a permit one would expect him to mention it and if the matter went to full trial the onus of proof of such a permit would lie upon the appellant and not upon the prosecution. There was no suggestion in the court below or in the petition of appeal or from counsel on the hearing of the appeal that the appellant had any permit for the movement of the stock. In the circumstances we decline to accept the submission.

As regards sentence, we are of the opinion that the sentence passed upon the appellant is too severe. He was sentenced to six months' imprisonment, which is the maximum sentence of imprisonment which may be imposed under the Ordinance, to a fine of Shs. 1,000/ –, and all nine head of cattle, which were the subject of the charge were, forfeited to the Crown. We think that this is an unnecessarily heavy sentence in all the circumstances, and we order that the fine of Shs. 1,000/ – be set aside and we reduce the imprisonment to three months. It follows therefore that as regards this conviction the appellant must be released forthwith.

*Appeal dismissed.*

For the appellant:

*Sheikh Mohammad Amin*

*Sheikh Mohamed Amin, Nairobi*

For the respondent:

*GA Twelftree* (Ag. Senior Crown Counsel, Kenya)

*The Attorney-General, Kenya*

**Kamau s/o Muga v R**  
**[1963] 1 EA 172 (SCK)**

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|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 26 October 1962                      |
| <b>Case Number:</b>      | 888/1962                             |
| <b>Before:</b>           | Rudd Ag CJ and Edmonds J             |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Street traffic – Evidence – Mechanically propelled vehicle – Causing death by dangerous driving – Evidence of mechanical defect in steering mechanism of vehicle – Accused under influence of drink – Defence that accident caused by mechanical defect – Whether onus of proof shifts to the defence – Traffic Ordinance, 1953, s. 43 and s. 44 (K.).*

*[2] Criminal law – Practice – Mechanically propelled vehicle – Whether indictment should contain both charge of causing death by dangerous driving and charge of driving under influence of drink.*

### **Editor's Summary**

The applicant was convicted in the magistrate's court on three counts, namely, causing death by dangerous driving, driving under the influence of drink and driving an unlicensed public service vehicle and now appealed against the conviction and sentence on the first count. At the trial, evidence was adduced that there was a mechanical defect in the steering mechanism of the vehicle and also that the appellant was under the influence of drink to such an extent

as not to be capable of proper control. The appellant's defence was that the accident which gave rise to the charge in the first count was caused by the mechanical defect. On appeal, it was argued for the Crown that even if the steering became defective, a defence based on such a mechanical defect could not succeed unless it was the only possible cause of the accident, in other words, that if the evidence were such as to indicate that the accident could have been caused by dangerous driving the existence of the mechanical defect would be of no assistance to the accused. Crown Counsel also invited the attention of the court to the English case of *R. v. McBride*, [1961] 3 W.L.R. 549 and requested a direction in similar terms to that given by the Court of Criminal Appeal on the advisability of joining a count of driving when under the influence of drink with a count of causing death by dangerous driving.

**Held –**

- (i) generally speaking an indictment containing a charge of causing death by dangerous driving should not include a charge of driving under the influence of drink but a charge of driving under the influence of drink may properly be coupled with a charge of dangerous driving if the evidence regarding the influence of drink upon the driver is such as to justify it. Dictum in *R. v. McBride*, [1961] 3 W.L.R. 549, approved.
- (ii) the fact that a person may be under the influence of drink and may not thereby be capable of having proper control of his vehicle is a factor by itself, and if no other factor intervenes may clearly be the cause of his driving dangerously, but if another factor intervenes, such as a mechanical defect of which the driver had no knowledge or no reason to suspect its presence or likelihood, then the question must inevitably arise as to whether even if he had not been under the influence of drink he could have so controlled the vehicle as to avoid driving dangerously.
- (iii) in such circumstances the onus is upon the Crown to establish affirmatively and beyond reasonable doubt that the person's dangerous driving was due to a cause which was within his control:

*R. v. Spurge*, [1961] 3 W.L.R. 23 applied.

- (iv) the prosecution had not proved that the erratic movement of the vehicle was due to a cause or causes other than the mechanical defect, in other words, that the appellant was driving dangerously irrespective of the defect and that the death of his passenger was not caused by that defect but was caused by reason of dangerous driving.

Appeal allowed. Conviction and sentence on the first count set aside.

**Cases referred to in judgment:**

- (1) *R. v. McBride*, [1961] 3 W.L.R. 549; [1961] 3 All E.R. 6; 45 Cr. App. R. 262.
- (2) *R. v. Spurge*, [1961] 3 W.L.R. 23; [1961] 2 All E.R. 688; [1961] 2 Q.B. 205.

**Judgment**

**Rudd Ag CJ:** read the following judgment of the court:

The appellant was convicted on the following three counts under the Traffic Ordinance, 39/1953:

Count 1: Causing death by driving, contrary to s. 44 (A) of the Traffic Ordinance, 1953, as amended by Ordinance 14/58.

*Particulars of Offence:* Kamau s/o Muga, on December 23, 1961, at about 8 p.m. on Nembu/Mutati road near Mutati Town in Kiambu district within

the Central Province caused the death of Ndungu s/o Kabue by driving motor vehicle Ford pick-up Reg. No. KFJ. 939 in a manner dangerous to the public having regard to all circumstances of the case.

Count 2: Driving when under the influence of drink, contrary to s. 43 (1) of the Traffic Ordinance, 1953.

*Particulars of offence:* Kamau Muga, on December 23, 1961, at about 8 p.m. at Nembu/Mutati road in Kiambu district of Central Province, drove a Ford pick-up motor vehicle No. KFJ. 939 on a road, when under the influence of drink to such an extent as to be incapable of having proper control of the vehicle.

Count 3: Driving unlicensed public service vehicle, contrary to s. 92 of the Traffic Ordinance, 1953.

*Particulars of Offence:* Kamau Muga, on December 23, 1961, at 8 p.m. at Nembu/Mutati Road in Kiambu district of Central Province, drove a public service vehicle, a Ford pick-up KFJ. 939 when there was not in force in relation to such vehicle a P.S.V. licence issued under the Ordinance.

The appellant was sentenced to six months' imprisonment on the first count and three months' imprisonment on the second count, to run concurrently, and to a fine of Shs. 50/- or fifteen days imprisonment in default of payment on the third count. Additionally the appellant was disqualified from holding a driving licence for twelve months. He now appeals against conviction and sentence on the first count.

Before dealing with the grounds of his appeal we would first allude to the subject of the joining of a count of driving when under the influence of drink under s. 43 (1) of the Ordinance with a count of causing death by driving under s. 44 (A). Learned counsel for the Crown invited our attention to the case of *R. v. McBride* (1), [1961] 3 W.L.R. 549, and a request was made that this court should give a direction in similar terms to that given by the Court of Criminal Appeal on the subject of joining these counts. There appears the following passage at p. 552 of the judgment of that court in *R. v. McBride* (1):

"In the course of the argument before this court a request was made by counsel for the prosecution that some guidance should be given on the question whether a charge under s. 6 . . . [Driving when under the influence of drink] . . . of the Road Traffic Act, 1960, should be preferred in addition to a charge of dangerous driving, assuming that there is evidence to justify such additional charge. Without wishing to give any general direction this court is of the following opinion: (a) an indictment containing a charge under s. 1 of the Act (causing death by dangerous driving) should not include a charge under s. 6. This view is in accordance with the practice under which an indictment charging manslaughter has not included a count alleging driving under the influence of drink. (b) A charge under s. 6 may properly be coupled with a charge of dangerous driving under s. 2 if the evidence regarding the influence of drink upon the driver is such as to justify it."

We desire respectfully to associate ourselves with this general direction for the guidance of the courts in this colony.

However, in regard to the relevance or otherwise of the condition of the driver due to drink to the question of whether he was driving dangerously the Court of Criminal Appeal had this to say, at p. 551:

"In the opinion of this court, if a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect is of probative value and is admissible

in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver has had drink is not of itself relevant: in order to render evidence as to the drink taken by the driver admissible, such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected. Secondly, there remains in the court an overriding discretion to exclude such evidence if in the opinion of the court its prejudicial effect outweighs its probative value. It is impossible to lay down any general rule as to the way in which this discretion should be exercised, as each case must be considered in the light of its own particular facts, but in the opinion of this court, if such evidence is to be introduced, it should at least appear of substantial weight."

We are of the opinion that in the case before us the evidence as to the appellant's condition in regard to drink was clearly of substantial weight, and the learned trial magistrate was right to exercise his discretion in admitting that evidence. We are of this opinion despite the fact that we do not think that, in the result, the prosecution discharged the burden upon it of proving beyond reasonable doubt that the accident which resulted in the death of a passenger in the appellant's vehicle was due to the factor of dangerous driving and to no other factor.

The appellant's defence to the first count was that the accident was caused by a defect in the steering mechanism of his vehicle. In a cautioned statement which he made to the police on the day following the accident the appellant made no mention of this defect, but five days later he appears to have asked to be allowed to add to that statement and he then said, again under caution:

"... when the vehicle fell down the steering had already broken, and I think that was the cause of the accident."

However, to the police officer investigating at the scene of the accident soon after it had occurred, the appellant said the accident was due to the fact that his steering had broken. The vehicle was not mechanically examined until January 9, 1962, some seventeen days after the accident, and evidence of the examination is given by a mechanic to whose workshop the vehicle had been taken and who was called as a defence witness. His evidence, which was not challenged by the prosecution, was as follows:

"The nut on the steering rod had fallen off. It connects the steering arm and the tie rod. If this nut comes off, the vehicle cannot be steered. If it can come off the retaining split pin is lost. This pin can come off by itself. It can also come off in a comparatively new vehicle."

A vehicle inspector who was called by the prosecution gave this evidence, which is in some support of the evidence of the mechanic:

"The drag link and a steering arm are a vital part of the steering. They are connected by a drop arm drag link connection. It is unlikely for the connecting pin to fall off but it may break and cause loss of control over the vehicle.

"As long as the retaining nut on the pin is in place, the vehicle can be controlled. The nut can get loose quicker on a rough road."

In his evidence at his trial the appellant spoke of the steering wheel spinning in his hands just before the accident.

In dealing with this defence and the evidence in regard thereto the learned magistrate said merely:

“I do not believe that the accident was caused by a mechanical defect in accused’s vehicle.”

We do not think that this was adequate consideration of the evidence as to the defect nor do we think that the learned magistrate appreciated fully the significance of the rough sketch which was put in by the prosecution. In referring to this he says that:

“... on a section of the road as shown in exhibit 3 (the sketch) he swerved about hitting the road bank on the offside several times and eventually overturned.”

We think that the use of the words “swerved about” are not an accurate description of the course of the vehicle. The rough sketch shows that the vehicle appears suddenly to have veered to its right and struck the bank running along the side of the road. It then came away from the bank and swung into it again a distance of 52 feet 6 inches further on. It again came away from the bank and then swung back into it only 18 feet further on. It did the same thing again and again striking the bank 39 feet further on, then 15 feet further on, then 67 feet further on, then 20 feet further on, and again 32 feet further on when it overturned. At no time during this distance of approximately 243 feet did the vehicle return to the middle or its left of the road to justify the description that it was swerving about. In our opinion the course of the vehicle involving these repeated turns into the bank are not inconsistent with faulty steering; or the least that may be said is that the behaviour of the vehicle is consistent with a faulty steering equally as it is with dangerous driving or the driving by a person who through the influence of alcohol has no control over his vehicle.

However, learned counsel for the Crown argued that even if the steering became defective, a defence based on such a mechanical defect could succeed only if it was the only possible cause of the accident, in other words, that if the evidence were such as to indicate that the accident could have been caused by dangerous driving the existence of the mechanical defect would be of no assistance to the driver. This contention seems to us to go right against the principle that a charge must be proved beyond reasonable doubt. However, counsel relied on the case of *R. v. Spurge* (2), [1961] 3 W.L.R. 23, where at p. 25 Salmon, J., who delivered the judgment of the Court of Criminal Appeal, said:

“If, on a prosecution under s. 11 (1) . . . [dangerous driving] . . . the Crown proves that a motor-vehicle driven by an accused in fact endangers the public, that is strong evidence and, indeed, in any but the most exceptional circumstances, is likely to be regarded by the jury as conclusive evidence that the accused was driving in a manner dangerous to the public. If, however, a motor-car endangers the public solely by reason of some sudden overwhelming misfortune suffered by the man at the wheel for which he is no way to blame – if, for example, he suddenly has an epileptic fit or passes into a coma, or is attacked by a swarm of bees or stunned by a blow on the head from a stone, then he is not guilty of driving in a manner dangerous to the public: *Hill v. Baxter*. It would be otherwise if he had felt an illness coming on but had still continued to drive, for that would have been a manifestly dangerous thing to do. It is true that in the examples given above it may be said that in a sense the man at the wheel was not driving at all, and therefore not driving dangerously. Indeed, that was the view expressed by the Divisional court in *Hill v. Baxter*, a view with which this court entirely concurs. But it is also true that the sudden mischance suffered by the man at the wheel totally prevented him from controlling the movements of the motor-car, and that no fault

of his in any way contributed to the danger. On that ground also, it seems to this court that even if the man at the wheel could in any sense be said to be driving, he would not be guilty of driving in a manner dangerous to the public. There does not seem to this court to be any real distinction between a man being suddenly deprived of all control of a motor-car by some sudden affliction of his person and being so deprived by some defect suddenly manifesting itself in the motor-car. In both cases the motor-car is suddenly out of control of its driver through no fault of his. Supposing a man is driving a motor-car at a slow speed close to his near side of wide road, keeping a proper lookout and exercising all due care and skill, he is clearly driving in a safe manner. He turns the steering wheel to negotiate a gentle bend, but owing to a mechanical defect in the steering mechanism of which he has and could have no knowledge, the steering suddenly fails completely and the wheel turns helplessly in his hands so that the motor-car careers across the road into an oncoming vehicle. In these circumstances clearly the motor-car endangers the safety of the member of the public driving the oncoming vehicle. Nevertheless, it could not truly be said that this danger was created by the manner of the driving of the motor-car which had gone out of control. There would be nothing in the driving which created the danger. It is quite true that if the motor-car had not been driven on the road, no danger to the public would have occurred. It is equally true that if the oncoming vehicle had not been on the road and no member of the public had been in the vicinity, there would have been no danger to the public. The driving of neither vehicle, however, would be the cause, but the driving of each would be the occasion, of the danger. As Lord Goddard, C.J., said in *Simpson v. Peat*: 'It is by no means impossible, and indeed must on occasions happen, that a situation of danger arises in which a motorist is involved but it cannot be said that he caused it by driving dangerously . . . Whether the charge is under s. 11 or s. 12, the offence can be committed although no accident takes place; equally because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention: but if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own; in an endeavour to avert a collision he swerves to his right – it is shown that had he swerved to the left the accident would not have happened; that is being wise after the event and, if the driver was in fact exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another and perhaps more highly skilled driver would have acted differently'."

The learned judge then added these words:

"This court desires to emphasise that cases in which a mechanical defect can successfully be relied upon as a defence to a charge of dangerous driving must be rare indeed. This defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. To drive a motor-car in such circumstances is manifestly dangerous. The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver."

We do not think that that case supports the contention for the Crown. Each case, of course, depends for decision upon its own facts and circumstances, but in our opinion the decision turns solely on the question:

"Was the sudden total loss of control in no way due to any fault on the part of the driver."

The fact that a person may be under the influence of drink and may not thereby be capable of having proper control of his vehicle is a factor by itself, and if no other factor intervenes may clearly be the cause of his driving dangerously. But if another factor intervenes, such as a mechanical defect of which the driver had no knowledge or no reason to suspect its presence or likelihood, then the question must inevitably arise as to whether even if he had not been under the influence of drink he could have so controlled the vehicle as to avoid driving dangerously. In such circumstances the onus is upon the Crown to establish affirmatively and beyond reasonable doubt that the person's dangerous driving was due to a cause which was within his control. The question of whether the onus in such circumstances ever shifts to an accused person was considered in *R. v. Spurge* (2). At pp. 27 – 28 of the report there appears this passage:

“It has been argued by counsel for the Crown that even if a mechanical defect can operate as a defence, yet the onus of establishing this defence is upon the accused. It is of course conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court, the contention made on behalf of the Crown is unsound, for in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor-car driven by the accused has endangered the public, the accused could successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of the jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict. It has been suggested by counsel for the Crown that the onus of establishing any defence based on mechanical defect must be upon the accused because necessarily the facts relating to it are peculiarly within his own knowledge. The facts, however, relating to a defence of provocation or self-defence to a charge of murder are often peculiarly within the knowledge of the accused since often the only persons present at the time of the killing are the accused and the deceased. Yet once there is any evidence to support these defences, the onus of disproving them undoubtedly rests upon the prosecution: *Wollmington v. Director of Public Prosecutions*. There is no rule of law that where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on these facts shifts to the accused. No doubt there are a number of statutes where the onus of establishing a statutory defence is placed on the accused because the facts relating to it are peculiarly within his knowledge. But we are not here considering any statutory defence. It is most important that the summing-up should contain a careful direction as to the onus of proof. It is equally important that the jury should be clearly told the narrow limits, laid down in this judgment, within which a defence based on sudden mechanical defect can operate.”

In the case before us the facts undoubtedly disclose that there was a mechanical defect. They also disclose that the appellant was under the influence of drink to such an extent as not to be capable of proper control of his vehicle. They also disclose that the passengers became anxious by reason of the erratic movement of the vehicle. The prosecution, however, did not prove that this erratic movement was due to a cause or causes other than the mechanical defect, in other words, that the appellant was driving dangerously irrespective of the defect and that the death of his passenger was not caused by that defect but was caused by reason of dangerous driving.



For these reasons we are of the opinion that the conviction of the appellant on the first count on the evidence that was adduced was wrong. His conviction and sentence on that count are accordingly set aside. There was no appeal against the convictions and sentences on the second and third counts and they are maintained.

*Appeal allowed. Conviction and sentence on the first count set aside.*

For the appellant:

*NJ Desai*

*NJ Desai, Nairobi*

For the respondent:

*F Mallon (Crown Counsel, Kenya)*

*The Attorney-General, Kenya*

**Suleman Ibrahim v Awadh Said**  
[1963] 1 EA 179 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 31 August 1962                            |
| <b>Case Number:</b>      | 165/1961                                  |
| <b>Before:</b>           | Sir Ralph Windham CJ                      |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Rent restriction – Proceedings instituted in High Court – Claim for vacant possession in area for which Rent Restriction Board established – Proceedings to be brought in court only if leave granted by Rent Restriction Board – No such leave granted – Whether High Court has jurisdiction – Rent Restriction Act, 1962, s. 2, s. 7, s. 19 and s. 33 (T.) – Interpretation and General Clauses Ordinance (Cap. 1), s. 10 (2) (e) (T.).*

[2] *Jurisdiction – Suit instituted in High Court prior to commencement of Rent Restriction Act – Rent Restriction Act depriving High Court of jurisdiction in cases coming within the Act – Whether jurisdiction of High Court preserved in relation to existing suits – Interpretation and General Clauses Ordinance (Cap. 1), s. 10 (2) (e) (T.).*

[3] *Statute – Interpretation – Retrospective operation – Existing rights – Effect on pending proceedings in High Court – Interpretation and General Clauses Ordinance (Cap. 1), s. 10 (2) (e) (T.) – Rent Restriction Act, 1962, s. 33 (T.).*

**Editor's Summary**

Prior to the coming into operation of the Rent Restriction Act, 1962, on August 20 of that year, the plaintiff, as he was entitled to do, instituted proceedings in the High Court claiming vacant possession of certain premises in Dar-es-Salaam. The case came on for hearing after that date and the question was raised as to whether the court had jurisdiction to proceed with the hearing of the suit. Under the Act, the Rent Restriction Board at Dar-es-Salaam, was primarily invested with jurisdiction as from that date to determine such proceedings but by s. 33 the High Court has jurisdiction to entertain such suits provided leave of the Rent Restriction Board shall have first been obtained. In this case such leave had not been obtained but it was contended by the plaintiff that his right to have his suit entertained by the High Court was preserved both by the general principles of interpretation of statutes whereby a statute will be presumed not to be intended to operate retrospectively so as prejudicially to affect vested rights and by s. 10 (2) (e) of the Interpretation and General Clauses Ordinance (Cap. 1),

**Held –**

- (i) as there had been no order of the Rent Restriction Board under s. 7 (1) (s) of the Act granting leave to the plaintiff to bring his proceedings for

recovery of possession in the court, the High Court had no power to entertain the proceedings.

*Valji Keshav Oza v. C. P. Jani & Sons*, [1957] E.A. 182 (Z.), and *Gangabhai Harji v. Bhoja Keshav*, [1957] E.A. 304 (T.), applied.

- (ii) a right to have one's rights determined before one tribunal rather than before another is not of itself such a right as must be presumed to have been preserved by any general rule of interpretation regarding the preservation of existing rights, nor by any statutory provision which does not expressly preserve such a right.
- (iii) section 10 (2) (e) of the Interpretation and General Clauses Ordinance did not have the effect of saving the jurisdiction of the High Court from the express provisions of the Rent Restriction Act.

Proceedings transferred to the Rent Restriction Board.

#### Cases referred to in judgment:

- (1) *Gangabhai Harji v. Bhoja Keshav*, [1957] E.A. 304 (T.).
- (2) *Valji Keshav Oza v. Jani (C. P.) & Sons*, [1957] E.A. 184 (Z.).

#### Judgment

**Sir Ralph Windham CJ:** In this suit the plaintiff claims vacant possession of the whole of a building situated in Dar-es-Salaam. The defendant has been in occupation of the building, partly as business premises and partly as a dwelling-house, since December 15, 1955. His occupation of the premises, as a tenant of the plaintiff on a month to month basis, began by virtue of a written agreement of that date. The plaintiff claims, though the defendant in his written statement of defence denies, that the plaintiff terminated this contractual tenancy by a notice to quit dated May 11, 1961, demanding vacant possession on June 30, 1961, and it is common ground that despite this demand (if made) the defendant has remained in possession until this day, whether in wrongful or rightful possession being in issue.

Before I can enter upon the merits of this suit, it is necessary to determine whether I have jurisdiction to do so, in the light of the enactment of the Rent Restriction Act, 1962, which came into operation on August 20, 1962, the suit being one for the recovery of possession of premises to which that Act applies (see s. 2 (2) thereof) within an area, namely Dar-es-Salaam, in which a Rent Restriction Board was established under s. 5 with effect from August 20, 1962, by Government Notice No. 344 of 1962 published in the *Gazette* of August 10.

Under the Rent Restriction Act, 1962, it is that Rent Restriction Board, to which I will hereinafter refer as the Board, which from and after August 20, 1962, is at least primarily vested with jurisdiction to determine applications for recovery of vacant possession of premises to which the Act applies by virtue particularly of s. 19 (1) and s. 33 of the Act.

Section 33 of the Act reads as follows:

- “33. (1) The court shall have jurisdiction to deal with any offence under this Act and with any proceedings for recovery of possession or arrears of rent or permission to levy distress affecting premises to which this Act applies for the bringing of which in the court leave has been granted by a Board in accordance with para. (s) of sub-s. (1) of s. 7, notwithstanding that by reason of the amount of penalty, claim or otherwise the case would not but for this provision be within

the jurisdiction of the court. The court may order that any costs incurred by a party be taxed on the scale applicable to proceedings before a Board.

- “(2) If a person takes proceedings under this Act in the High Court which he could have taken in the court, the High Court may entertain the proceedings and shall have the same powers as the court under this Act but such person shall, if successful, only be entitled to recover costs on the subordinate court scale, or the scale applicable to proceedings before a Board, as the High Court may order.
- “(3) The High Court and the court shall conform to this Act between landlords and tenants, and in the case of any proceedings affecting premises to which this Act applies, the High Court or the court, unless satisfied that under this section it may entertain such proceedings, shall transfer the same to a Board having jurisdiction for disposal or the granting of any necessary leave under para. (s) of sub-s. (1) of s. 7, and the Board may either dispose of such proceedings or grant the necessary leave to bring such proceedings in the High Court or the court.”

The expression “the court” means by definition a subordinate court presided over by a first class magistrate.

Such jurisdiction as the High Court possesses to entertain such proceedings from and after August 20, 1962, is vested in the High Court by s. 33 of the Act and in no other manner. This was laid down by the High Court of Tanganyika in *Gangabhai Harji v. Bhaja Keshav* (1), [1957] E.A. 304 (T.), when the identically worded s. 33 (formerly s. 32) of the old Rent Restriction Ordinance (Cap. 301), which Ordinance expired at the end of 1960, fell to be construed. In that case Biron, A.J., held, at p. 306, that unless leave has been granted by the Board under s. 7 (1) (s) of the Ordinance for the bringing of the suit before a first class subordinate court, then the effect of s. 33 is that it cannot be entertained by the High Court, because:

“it is obvious that the legislature intended by this section that all questions which could be determined by a Rent Restriction Board should be referred to such board, and deliberately ousted the jurisdiction of the courts on such questions”.

This limited jurisdiction of the High Court to entertain suits primarily determinable by a Rent Restriction Board had, a few months previously, been laid down in even clearer terms by myself, when Chief Justice of Zanzibar, in *Valji Keshav Oza v. Jani (C. P.) & Sons* (2), [1957] E.A. 184 (Z.), in construing the identically-worded s. 33 of the Rent Restriction Decree, 1953, of Zanzibar, when I further observed, with regard to the provision of sub-s. (3) that the High Court:

“unless satisfied that under this section it may entertain such proceedings, shall transfer the same to a board having jurisdiction”,

that this provision:

“appears to exclude any concurrent jurisdiction of the High Court founded on any provision of the law outside s. 33 or any inherent jurisdiction”.

In the present case there has been no order of the Rent Restriction Board under s. 7 (1) (s) of the Act granting leave to the plaintiff landlord to bring his proceedings for recovery of possession in the court. It is therefore clear, following the decision of this court in *Gangabhai's* case (1), with which I respectfully concur, and my own decision in the above Zanzibar case, from which I do not resile, that by reason of the enactment of the Rent Restriction Act, 1962, the High Court has no power to entertain the present proceedings, at least not until leave is granted by the Board under s. 7 (1) (s) to bring them before the court, unless there exists any saving provision preserving the plaintiff's right to have his suit determined by the High Court by reason of the fact that he instituted

it in the High Court at a time when no Rent Restriction legislation and no Rent Restriction Board were in existence, and when the High Court was undisputedly vested with jurisdiction to entertain it.

Admittedly there is no such saving provision in the Rent Restriction Act, 1962, itself. But learned counsel for the plaintiff contends that the plaintiff's right to have his suit entertained by the court in which he quite properly instituted it is preserved, first, by the general rule of interpretation of statutes, expounded in Maxwell Interpretation of Statutes (10th Edn.), at p. 215, whereby a statute will be presumed not to be intended to operate retrospectively so as prejudicially to affect vested rights; and secondly, by s. 10 (2) (e) of the Interpretation and General Clauses Ordinance (Cap. 1) which provides that –

“Where an Ordinance repeals any other enactment, then, unless a contrary intention appears, the repeal shall not: . . . (e) affect any investigation, legal proceedings, or remedy in respect of, any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceedings, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Ordinance had not been passed”.

Now with regard to both these contentions I would first observe that there is no question of the plaintiff, by reason of the enactment of the Rent Restriction Act, 1962, being deprived of any substantive right. It is the right to bring proceedings for the ejectment of the defendant, by reason of the latter having been served with a valid notice to quit, which is his substantive right; and that is substantially preserved. The only change concerns the proper tribunal in which the right can be enforced; and a right to have one's rights determined before one tribunal rather than before another is not in itself such a right as must be presumed to have been preserved by any general rule of interpretation regarding the preservation of existing rights, nor by any statutory provision which does not expressly preserve such a right.

And that brings us to s. 10 (2) (e) of the Interpretation and General Clauses Ordinance. This certainly does preserve the right to “institute, continue or enforce” one's remedy “as if the repealing Ordinance had not been passed”. But there are, as I see it, two things which exclude this case from the saving provisions of s. 10 (2) (e). First, the section is expressed to apply only where an Ordinance (which expression by definition now includes “Act”) “repeals any other enactment”. Here, however, it is difficult to see what other enactment is being repealed. Certainly no enactment is expressly repealed by the Rent Restriction Act, 1962. It is suggested that what is in effect being partially repealed is s. 2 (1) of the Judicature and Application of Laws Ordinance, 1961, in so far as that section confers on the High Court jurisdiction to try any case, civil or criminal, and thus confers on the plaintiff his right to have his ejection suit tried by the High Court. This, to my mind, is stretching the meaning of “to repeal” too far. Moreover, s. 2 (1) itself contains the answer to the contention. It reads:

“2.(1) Save as hereinafter, or in any other written law, expressed, the High Court shall have full jurisdiction, civil and criminal”.

And s. 2 (2) provides that this jurisdiction shall be exercised:

“in conformity with the written laws which are in force in Tanganyika on the date on which this Ordinance comes into operation (including the laws applied by this Ordinance) or which may hereafter be applied or enacted . . .”.

Thus, any jurisdiction conferred on the High Court by the general terms of s. 2 (1) in its reference to full civil jurisdiction, and thus any right which those terms might be said to confer upon a landlord to have his ejection suit decided in the High Court, are expressly made subject to “any other written law” by sub-s. (1) and, more explicitly, by sub-s. (2), such jurisdiction is to be exercised:

“in conformity with the written laws which . . . . . may hereafter be applied or enacted”.

The Rent Restriction Act, 1962, is itself such a subsequently enacted written law. Accordingly any right of the plaintiff to have his suit tried by the High Court was always subject to any later enactment which might curtail that right; and the Act of 1962 deprived him of nothing of which he had not already been prospectively deprived.

The second thing, which would in any event exclude the application of s. 10 (2) (e) of the Interpretation and General Clauses Ordinance to the institution of suits in, or the continuation of suits already instituted in, the High Court, after the enactment of the Rent Restriction Act, 1962, is the presence of the words “unless the contrary intention appears” in the second line of s. 10 (2). For it seems to me that just such a contrary intention does appear in the Rent Restriction Act, 1962, itself, and in particular in s. 33 of it; that is to say, an intention to oust the jurisdiction of the High Court or of the resident magistrate’s court, to entertain any civil proceedings which the Board is given jurisdiction to try unless, by reason of the likelihood of difficult questions of law or fact arising, the Board has granted leave under s. 7 (1) (s) for the proceedings to be brought in the court. And it is to be noted that under s. 33 (3) the High Court is required to “transfer” proceedings to the Board unless satisfied that under the section it may “entertain” the proceedings. These words clearly contemplate, in my view, that even where proceedings have been rightly instituted in the High Court, the High Court cannot entertain them, that is to say cannot proceed to try the proceedings so instituted, unless on the day when they come to trial it has jurisdiction, or still has jurisdiction, to try them.

For these reasons, I hold that this court no longer has jurisdiction to try this suit; and s. 33 (3) accordingly gives me no option but to transfer the proceedings, as I hereby do transfer them, to the Rent Restriction Board of Dar-es-Salaam, which in the words of that sub-section, may:

“either dispose of such proceedings or grant the necessary leave to bring such proceedings in the High Court or the court”.

Since it is no fault of the plaintiff that this court no longer has jurisdiction to try this suit which he rightly instituted in it, I make no order for the costs of the suit in this court. Subject to the provisions of s. 33 (2) of the Act, those costs will follow the decision of the Board.

*Proceedings transferred to the Rent Restriction Board.*

For the plaintiff:

*MN Rattansey*

*Mahmud N. Rattansey & Co, Dar-es-Salaam*

For the defendant:

*NA Velji*

*Sayani & Co, Dar-es-Salaam*

**Juma Shabani Keshallilla v Republic**  
**[1963] 1 EA 184 (CAD)**

**Division:** Court of Appeal at Dar-Es-Salaam  
**Date of judgment:** 22 March 1963  
**Case Number:** 199/1962  
**Before:** Sir Ronald Sinclair P, Sir Trevor Gould Ag VP and Newbold JA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Tanganyika – Weston, J

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*[1] Criminal law – Revision – Sentence – Accused released on probation by magistrate – In revision probation order set aside – Sentence of one year’s imprisonment substituted – Power to substitute sentence in revision – Penal Code (Cap. 16), s. 265 and s. 270 (T.) – Criminal Procedure Code (Cap. 20), s. 305 (1), s. 306 (2), s. 319 and s. 329 (T.) – Indian Code of Criminal Procedure, s. 423 and s. 562 (3).*

**Editor’s Summary**

The appellant was convicted of stealing by a magistrate who under the powers conferred by s. 305 (1) of the Criminal Procedure Code, ordered that the appellant be released upon entering a bond to appear and receive sentence at any time within three years if called upon and meantime to be of good behaviour. In revision the High Court set aside the order of the magistrate and substituted a sentence of one year’s imprisonment. The appellant appealed on the ground that the High Court had no power to substitute a sentence of imprisonment for an order made by the magistrate under s. 305 of the Criminal Procedure Code.

**Held –**

- (i) an order made under s. 305 of the Criminal Procedure Code does not amount to a sentence.
- (ii) the word “alter” in s. 319 (1) (c) of the Criminal Procedure Code should be construed as embracing the substitution of another order, in the same way as the power to alter a finding gives power to substitute a different conviction; a sentence is an order of the court and is one the nature of which may under s. 319 be altered by the revising court.
- (iii) in revision the High Court has power to substitute a sentence of imprisonment for a probation order to come up for sentence if called upon.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *R. v. Ghasite* (1915), 37 All. 31.



(2) *Zamir Qasim v. R.* (1944), A.I.R. All. 137.

(3) *R. v. Birch* (1902), 24 All. 306.

### **Judgment**

**Newbold JA:** read the following judgment of the court: On August 8, 1962, the appellant was convicted by the resident magistrate, Tanga, on a count of stealing contrary to s. 265 and s. 270 of the Penal Code, and in exercise of the powers conferred by s. 305 (1) of the Criminal Procedure Code the resident magistrate ordered that the appellant be released on his entering into a bond to appear and receive sentence at any time within 3 years if so called upon and in the meanwhile to be of good behaviour. On the application of the Director of Public Prosecutions the High Court exercised its powers of revision contained in s. 329 of the Criminal Procedure Code, set aside the order of the resident magistrate and substituted therefore a sentence of imprisonment for one year. The appellant appeals to this court on the ground

that the High Court had no power to substitute a sentence of imprisonment for an order made by a resident magistrate under s. 305.

The relevant words of s. 305 (1) are:

“ . . . if it appears to the court before which he [the offender] is convicted that . . . it is expedient to release the offender on probation, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond . . . to appear and receive sentence when called upon . . . ”.

Mr. Jadeja, who appeared for the appellant, in a clear and concise argument submitted that when a resident magistrate made a probation order under s. 305 no sentence was imposed on the offender. We agree with him. If any support were needed for that submission in addition to the clear words of s. 305 (1), such support is to be found in s. 306 (2) which empowers the court when the offender is subsequently brought before it to “pass sentence”, which sentence must be the sentence on the original conviction.

The relevant powers of the High Court on revision are contained in s. 329 (1) and s. 319 (1), which sections read as follows:

- “329. (1) In the case of any proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –
- (a) in the case of a conviction, exercise any of the powers conferred on it as court of appeal by s. 319, s. 321 and s. 322 and may enhance the sentence;
  - (b) in the case of any other order other than an order of acquittal, alter or reverse such order.”
- “319. (1) At the hearing of the appeal, the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the public prosecutor, if he appears, may then address the court. The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the public prosecutor in his address. The court may then, if it considers there is not sufficient ground for interfering, dismiss the appeal or may –
- (a) in an appeal from a conviction:
    - (i) reverse the finding and sentence, and acquit the accused or discharge him under s. 38 of the Penal Code, or order him to be retried by a court of competent jurisdiction, or direct the sub-ordinate court to hold a preliminary inquiry; or
    - (ii) alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence; or
    - (iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence;
  - (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;
  - (c) in an appeal from any other order, alter or reverse such order, and in any such case may make any amendment or any consequential or incidental order that may appear just and proper.”

The appellant submits that the above provisions are taken in substance from the Code of Criminal Procedure of India, as it existed in 1919, that a number of Indian decisions, including *R. v. Ghasite* (1) (1915), 37 All. 31, are to the effect that a court on revision could not substitute a sentence for an order made under

the equivalent section to s. 305 until specific power for that purpose was given in India by an amendment made in 1923; and that no similar amendment exists in the Tanganyika legislation. The appellant further submits that the power conferred by either s. 329 (1) (b) or s. 319 (1) (c) is a power to “alter or reverse”; that to reverse means only to set aside and to alter means only to modify without changing the nature of the thing modified; and that the additional powers given by s. 319 (1) (c) relate only to consequential changes and that the imposition of a sentence is not consequential upon the reversal of an order for probation. Put shortly, the appellant’s submissions were that the High Court on revision might set aside the order made by the resident magistrate to come up for sentence, but, having done that, the High Court had no power either to impose a sentence itself or to remit the case to the resident magistrate for him to impose a sentence. The effect of this would, of course, be that there would be a conviction recorded against the appellant but no court would have power to impose any sentence in respect of the conviction. This appears to be a nonsensical position and to avoid it the alternatives open to the revising court would be either to refrain from interfering with the original order to appear and receive sentence or to order a new trial, a course which we think would be seldom justified. That, however, appears to have been the position on the Indian authorities and legislation before specific power to impose on revision a sentence in lieu of such an order was enacted by s. 562 (3) of the Indian Code of Criminal Procedure.

The question is whether the position is the same in Tanganyika. In the cases of which *R. v. Ghasite* (1), has been cited as an example, the question decided was merely that where no sentence existed (and we have already said than an order under s. 305 of the Tanganyika Criminal Procedure Code does not amount to a sentence), it could not be enhanced. Enhancement of sentence is one of the powers of the High Court in revision and in India the term has been construed as making the sentence more severe, either by way of length of imprisonment or by substituting a more severe form of punishment, i.e. rigorous imprisonment for simple imprisonment. In *R. v. Ghasite* (1), the other powers conferred upon the High Court in revision were not discussed and it must be assumed that they were not considered wide enough to enable the revising court to impose a sentence of imprisonment.

We have set out above the relevant portions of s. 329 and s. 319 which in Tanganyika contain these powers. In a case such as the present where there was a conviction and a consequent order we consider that the revising court could draw its authority either from s. 329 (1) (a) or (b). Sub-paragraph (a) is the wider because it imports the whole of the powers given under s. 319. Now it is true that nowhere in that section is the revising court in terms given power to pass a sentence where no sentence has been passed before, and yet it is obviously intended to give power to deal with every situation which could arise. It is to be noted that it is a great deal wider than the corresponding section of the Indian Code – s. 423. The Tanganyika section contains power to increase a sentence, which is lacking in the Indian one. Both contain power to alter the nature of a sentence but that power in Tanganyika is unlimited whereas in India the nature of the sentence may not be altered so as to result in enhancement.

We have referred to the very wide terms of s. 319 as an indication that the whole section should, in our opinion, receive a broad construction in accord with its obviously all-embracing intention. If the power to substitute a sentence for an order under s. 305 (1) of the Tanganyika Criminal Procedure Code is to be found at all in s. 319 (1) it is in sub-cl. (c) thereof. There is power to reverse an order (which means to extinguish it) but there is power also to alter it and to make any amendment which is just and proper. The word “amend” means, according to the Shorter Oxford Dictionary, to “free from faults, correct,

convert". That is a wide meaning but a word must of course be construed in the context in which it is used. The meaning of "alter" is given in the same dictionary as "to make different in some respect without changing the thing itself". That is the meaning contended for by counsel for the appellant, but in our view the word can have a wider meaning if required or justified by the context. It is used earlier in the section in the phrase "alter the finding" and in that context it has been held to mean that the finding can be altered to any other finding that the court considers proper on the findings of fact at which it arrives in appeal. The authority is *Zamir Qasim v. R.* (2) (1944), A.I.R. All. 137 at p. 142. The usual alteration of a finding as exemplified in the case is the substitution of a conviction of one offence for that of another. That appears to involve a complete substitution and goes further than a mere change of form. We think that, on a similar approach, it is quite unnecessary to regard a power to alter an order made under s. 305 (1) of the Code as being restricted to alterations, for example, in the amount or term of the bond. In the context of the section, having regard to its wide scope and plain object, in our opinion the word is to be construed as embracing the substitution of another order, in the same way as the power to alter a finding gives power to substitute a different conviction. A sentence is an order of the court and it is one the nature of which may under the section be altered by the revising court. Either order could have been made by the magistrate, and we see no such divergence in concept or purpose between the two as would render it incongruous in the context to attach to the power to "alter" the meaning that one such order could be substituted for the other. It would appear that in *R. v. Birch* (3) (1902), 24 All. 306, a probation order was substituted for a sentence of imprisonment in reliance upon powers conferred by s. 423 (d) of the Indian Code.

We would add, as the matter was mentioned in the court below, that we are unable to see that if the revising court sent the case back to the magistrate to pass sentence, he would have any power to do so. He was *functus officio* and could only exercise any further powers by virtue of some specific authority. It appears to us that s. 332 of the Code is neither apt nor adequate for the purpose.

For the foregoing reasons the appeal is dismissed and the decision and sentence of the High Court confirmed.

*Appeal dismissed.*

For the appellant:

*SJ Jadeja*

*Fraser Murray, Thornton & Co, Dar-es-Salaam*

For the respondent:

*AM Troup (State Attorney, Tanganyika)*

*The Director of Public Prosecutions*

**Abdulrahman Bin Mohamed and another v R**  
[1963] 1 EA 188 (CAZ)

**Division:** Court of Appeal at Zanzibar

**Date of judgment:** 30 March 1963

**Case Number:** 168/1962  
**Before:** Sir Ronald Sinclair P, Sir Trevor Gould Ag VP and Newbold JA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Zanzibar – Horsfall, J

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[1] *Criminal law – Evidence – Wife – Marriage by native law or custom – Marriage monogamous but potentially polygamous – Husband charged with murder – Whether wife competent witness for prosecution – Zanzibar Order-in-Council, 1924, art. 24 (Z.) – Criminal Procedure Decree, s. 147 (Z.) – Evidence Decree (Cap. 5), s. 122 (Z.) – Indian Evidence Act, 1872, s. 122.*

### Editor's Summary

The two appellants were tried together and convicted of murder. On appeal the only substantial point was whether the first appellant's wife by native law or custom was a competent witness for the prosecution against her husband. The trial judge had found that the parties were married according to Makonde custom, that the marriage was monogamous in the sense that Makondes have only one wife at a time, that religion did not enter into such a union which was also impermanent in the sense that either spouse could secure release by payment at any time.

**Held** – in Zanzibar a wife married according to native law or custom which is potentially polygamous, is a competent witness against her husband upon a charge of murder, even if the marriage is in fact monogamous; accordingly the first appellant's wife was a competent witness for the prosecution.

*R. v. Mwakio Asani* (1932), 14 K.L.R. 133 and *R. v. Toya s/o Mamure* (1932), 14 K.L.R. 145, followed.

Appeal dismissed.

### Cases referred to in judgment:

- (1) *R. v. Amkeyo* (1917), 7 E.A.L.R. 14.
- (2) *Robin v. R.* (1929), 12 K.L.R. 134.
- (3) *R. v. Mwakio Asani* (1932), 14 K.L.R. 133.
- (4) *R. v. Toya s/o Mamure* (1932), 14 K.L.R. 145.
- (5) *R. v. Mange s/o Mulebi* (1948), 15 E.A.C.A. 69.
- (6) *Lenson Ambindwile s/o Mafubila v. R.* (1955), 22 E.A.C.A. 448.
- (7) *Laila Jhina Mawji and Another v. R.* (1956), 23 E.A.C.A. 609.
- (8) *Joseph Kabui v. R.* (1954), 21 E.A.C.A. 260.

### Judgment

**Sir Ronald Sinclair P:** read the following judgment of the court: The two appellants were convicted at a joint trial of the murder of a shopkeeper named Mohamed bin Salum during the night of July 4/5, 1962.

The appeal of the first appellant, who was the first accused at the trial, raises an important point, namely, whether Fatuma binti Yusuf, the “wife” of the first appellant, was a competent witness for the prosecution. After Fatuma, who chose to be affirmed, had given evidence as to her marriage to the first appellant, counsel for this appellant objected to the admissibility of her evidence as against him. The assessors then retired and in their absence further evidence was called

and argument was heard on the question of admissibility. The learned judge held that Fatuma was the wife of the first appellant by native custom and that as such she was a competent witness for the prosecution as against the first appellant.

Under the common law of England which was applied to Zanzibar by art. 24 of the Zanzibar Order-in-Council, 1924, subject to certain exceptions which are not applicable in the present case, the husband or wife of the person charged is not a competent witness for the prosecution. Section 147 of the Criminal Procedure Decree (Cap. 8), provides that in any inquiry or trial the wife or husband of the person charged shall be a competent witness for the prosecution or the defence without the consent of such person in certain cases specified in the section. The charge of murder in the present case does not fall within the cases specified in the section. If, therefore, Fatuma was the wife of a marriage such as is contemplated by the relevant law in force in Zanzibar she was not a competent witness for the prosecution as against her husband.

It will be convenient here to set out also the provisions of s. 122 of the Evidence Decree (Cap. 5), which reads:

“122. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.”

That section is a reproduction of s. 122 of the Indian Evidence Act, 1872, which is in force in Kenya and Tanganyika and to which reference will later be made.

The facts found by the learned judge relating to the union of the first appellant and Fatuma are set out in his ruling as follows:

“I find that this witness is the wife of the 1st accused according to Makonde custom. The marriage was arranged by Natukula, the headman of the Makondes. She was asked and agreed to marry the 1st accused. 1st accused paid Shs. 200/-, for her which was paid through her father to her former husband to release her. It is a monogamous in the sense that Makondes have only one wife at a time, but it is impermanent in the sense that either husband or wife can buy their release at any time. Religion does not enter into such a union. There was no ceremony. It is not a Muslim marriage.”

With regard to those facts the judge said:

“In my view it is merely incidental in this Makonde customary marriage that the union is temporarily monogamous and that the woman gave her consent. In my opinion the essence of the union is its temporary nature. By payment of money the husband can buy one wife after another or wife secure release. This only differs from polygamy in that the husband does not possess the different women at the same time. The potential impermanency of such a union cannot create the mutual trust and confidence which exists in civilized marriages.”

In arriving at his conclusion that a party to a marriage by native custom is a competent witness for the prosecution he followed the decision of the High Court of East Africa in *R. v. Amkeyo* (1) (1917), 7 E.A.L.R. 14, by which he considered he was bound. That was not a decision of the Court of Appeal for Eastern Africa and he was wrong in thinking he was bound by it.

We agree with the learned judge that this was not a valid Muslim marriage, but that it was a marriage contracted according to native law or custom. Although the first appellant was a Muslim, Fatuma was not. There is no suggestion that she is or was a Christian or believed in the Scriptures. In Wilson's Anglo-Muhammadan Law (6th Edn.), at p. 113, para. 39 (2), it is said:

"There can be no valid marriage according to Muhammadan Law with a woman who is not either a Muhammadan or Kitabia, i.e., a Jewess or a Christian, believing in Scriptures the sacredness of which is acknowledged by Muhammadans."

We accept that passage as a correct statement of the Mohamedan Law.

It is now necessary to examine the decision in *Amkeyo's* case (1). That was a case in which a wife by native custom gave evidence for the prosecution against her husband who was charged with an offence under the Stock and Produce Theft Ordinance, 1913, and the question which arose was whether certain communications made to her by her husband were privileged under the provisions of s. 122 of the Indian Evidence Act. It seems that, subject to the question whether the provisions of s. 122 were applicable, she was a competent witness for the prosecution, for s. 120 of that Act provides, *inter alia*, that in criminal prosecutions against any person, the husband or wife of such person, respectively, shall be a competent witness. There was no limitation of the competency of such a wife in the Criminal Procedure Code, 1913, which was then in force, though in the case of the trial of Europeans only, there was a provision (s. 358), similar to s. 147 of the Zanzibar Criminal Procedure Decree. Hamilton, C.J., who delivered the first judgment, said at p. 16 of the report:

"In my opinion the use of the word 'marriage' to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerable confusion of ideas. I know of no one word that correctly describes it; 'wife-purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilized peoples.

"The elements of a so called marriage by native custom differ so materially from the ordinarily accepted idea of what constitutes a civilised form of marriage that it is difficult to compare the two.

"In the first place the woman is not a free contracting agent but is regarded rather in the nature of a chattel, for the purchase of which a bargain is entered into between the intending husband and the father or nearest male relatives of the woman. In the second place there is no limit to the number of women that may be so purchased by one man, and finally the man retains a disposing power over the women he has purchased.

"Women so obtained by a native man are commonly spoken of, for want of a more precise term, as 'wives' and as 'married women', but having regard to the vital difference in the relationship of the parties to a union by native custom, from that of the parties to a legal marriage, I do not think that it can be said that the native custom approximates in any way to the legal idea of marriage."

Hamilton, C.J., then went on to consider whether such a marriage was recognised as a legal marriage by the law of the Protectorate and referred to a proviso to art. 35 of the East African Marriage Ordinance, 1902, which reads:

"Any person who is married under this Ordinance, or whose marriage is declared by this Ordinance to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native



custom, but save as aforesaid, nothing in this Ordinance contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom or in any manner apply to marriages so contracted.”

He continued:

“At first sight this article might seem to countenance the idea that a union by native custom is a legal marriage; but this idea seems to me to depend solely on the use of the word ‘marriage’ to denote both a union by native custom and marriage under the Ordinance. When the real bearing of the article is considered it will be seen that the Ordinance in no way affects ‘native marriages’ and leaves them in the position they were previously with all such rights and incidents as may attach to them by native custom. That is to say the marriage law of the Protectorate expressly omits native unions from its purview, and though recognising their existence does not deal with them as legal marriages. That this is so, is borne out by the provisions of art. 33 (1) of the Ordinance which contemplates a party to a ‘native marriage’ disposing of all his women but one and marrying that one under the Ordinance.”

He held that a party to such a marriage could not claim the protection granted by s. 122. The other member of the court, Pickering, Ag. J., concurred. Before giving further consideration to this decision we propose to refer to decisions of this court in which it has been followed or considered.

The earliest reported case is *Robin v. R.* (2) (1929), 12 K.L.R. 134. That was an appeal from a conviction for murder by the High Court of Nyasaland and this court expressed the opinion that *Amkeyo’s* case (1), was authority for holding that the evidence of a wife by native custom against her husband was admissible. That opinion was obiter since the court accepted the finding of the trial judge that the woman was not in fact the wife of the appellant. It has not been possible in the time available to ascertain the relevant law in force in Nyasaland at the time of that decision. The first Criminal Procedure Code, Ordinance No. 23 of 1929, did not come into force until after the date of the decision. It seems, however, that by virtue of sub-s. (2) of s. 15 of the British Central Africa Order-in-Council, 1902, as amended by the Nyasaland Order-in-Council, 1907 (No. 2), it was the law of England which was applicable.

The next reported case is *R. v. Mwakio Asani* (3) (1932), 14 K.L.R. 133, an appeal from the Supreme Court of Kenya. It was held that the whole of the evidence of a wife by native custom (she was one of three wives), including communications made to her by her husband, was admissible against her husband. The court stated that there was no reason for differing from the opinion expressed in *Robin v. R.* (2). That decision was followed in *R. v. Toya s/o Mamure* (4) (1932), 14 K.L.R. 145, another appeal from the Supreme Court of Kenya. At that time the Indian Evidence Act was in force in Kenya and the Criminal Procedure Code contained a section (s. 148) in the same terms as s. 147 of the Zanzibar Criminal Procedure Code.

Up to 1936 the Tanganyika Criminal Procedure Code also contained a section (s. 148) in the same terms as the Zanzibar s. 147. That section was then replaced and it was provided that the wife or husband of the person charged shall be a competent witness for the prosecution except that the wife or husband of a monogamous marriage (which was defined) shall be a competent witness for the prosecution only in certain specified cases. After the section was replaced it was held by this court in *R. v. Mange s/o Mulebi* (5) (1948), 15 E.A.C.A. 69, following *Robin v. R.* (2), that a communication made by the appellant to one of his two wives by native custom was not privileged under s. 122 of the Indian Evidence Act.

The question of the admissibility of communications between husband and wife was again considered in another appeal from the High Court of Tanganyika, *Lenson Ambindwile s/o Mafubila v. R.* (6) (1955), 22 E.A.C.A. 448. A wife by native custom of the appellant gave evidence of communications made to her by her husband. The court did not, however, find it necessary to come to any conclusion as to the admissibility of her evidence since there was other admissible evidence by a third party of such communications. But, after referring to the cases which we have cited, the court said at p. 449:

“It may be necessary at some time for this court or another tribunal to review all the decisions cited above and to consider their real effect, but we do not consider it necessary or advisable to do so in the present appeal. For one thing, we have not had the advantage of any argument on behalf of the appellant, who was neither present nor represented, though we are indebted to the learned acting attorney-general for his assistance in referring us to the relevant decisions on the point.”

In *Laila Jhina Mawji and Another v. R.* (7) (1956), 23 E.A.C.A. 609, a husband and wife who were Ismaili Khojas were convicted of conspiracy by the High Court of Tanganyika. Ismaili Khojas are Muslims and the marriage was potentially polygamous. It was held by the Privy Council that the English rule that a husband and wife cannot be convicted of conspiracy was part of the criminal law of Tanganyika and that the rule applied to any husband and wife of a marriage valid under Tanganyika law even though the marriage was potentially polygamous. Their lordships based their decision that the rule applied to any husband and wife of such a marriage on the ground that in the criminal law of Tanganyika the words husband and wife, if unqualified, are not restricted to monogamous unions and that if it is desired to deal with monogamous marriages as distinct from other marriages express words are used. The same reasoning cannot, however, be applied in Zanzibar since the criminal law of Zanzibar does not distinguish between monogamous and polygamous marriages. We do not think, therefore, that this decision of the Privy Council is of any assistance in the present case. In our view, Zanzibar being a Muslim state, the test to be applied is not whether the marriage is monogamous or polygamous.

To sum up, this court has held in two cases, *R. v. Mwakio Asani* (3) and *R. v. Toya s/o Mamure* (4), that in Kenya, where the common law of England is in force and where the Criminal Procedure Code contains a section which is in identical terms with the Zanzibar s. 147, a wife married according to the native custom is a competent witness for the prosecution. As in Zanzibar, the criminal law of Kenya does not distinguish between monogamous and other marriages. Those two decisions have stood for many years and so far as we are aware have never been differed from. In criminal cases this court is bound by its own decisions unless the court is of opinion that to follow the earlier decision which is considered to be erroneous would involve supporting an improper conviction: *Joseph Kabui v. R.* (8) (1954), 21 E.A.C.A. 260. The first appellant was not represented at the hearing of the appeal and we have not had the advantage of any argument on his behalf but, having given the matter full consideration, we are not prepared to differ from those earlier decisions. In our view they should be followed in determining whether one party to a marriage contracted according to native law or custom is a competent witness for the prosecution.

African customary marriages in East Africa are usually polygamous or potentially polygamous. Does the fact that the marriage in the present case was monogamous take it out of the class of customary marriages which were in the contemplation of the court in *R. v. Mwakio Asani* (3) and *R. v. Toya s/o Mamure* (4)? We do not think so. The marriage appears to have all the elements of

“wife-purchase”, the description given to an African customary marriage in *Amkeyo’s* case (1). There was no religious ceremony or, indeed, any ceremony at all. The first appellant merely paid Shs. 200/- for her, which money was paid through her father to her former husband to release her. Either party could buy his or her release at any time. It may well be a valid marriage in Zanzibar but, bearing in mind *Amkeyo’s* case (1), and the decisions of this court in which that case was followed, we do not think the wife of such a marriage is within the purview of the general rule that the husband or wife of the person charged is not a competent witness for the prosecution. In our opinion, therefore, Fatume was a competent witness for the prosecution.

That is the only point of substance in the appeals. There was ample evidence to support the convictions and we can find no material misdirection either on law or on fact.

The appeals are dismissed.

*Appeal dismissed.*

The appellant in person.

For the respondent:

*KC Kotecha (Crown Counsel, Zanzibar)*

*The Attorney-General, Zanzibar*

## **Re an Application by Lombard Banking Limited** [1963] 1 EA 193 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 18 February 1963                          |
| <b>Case Number:</b>      | 3/1962                                    |
| <b>Before:</b>           | Mosdell J                                 |
| <b>Sourced by:</b>       | LawAfrica                                 |

(Reference on taxation under r. 5 of the Advocates (Remuneration and Taxation of Costs) Rules.)

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*[1] Costs – Taxation – Company – Winding-up – Decision to admit proof of debt of one creditor as a secured debt – Applications by two other creditors seeking reversal of this decision – Applications consolidated at hearing – Both applications successful – Two separate bills of costs filed – Interests of both applicants similar – Whether only one set of costs should be allowed – Advocates (Remuneration and Taxation of Costs) Rules, r. 5 (T.).*

**Editor’s Summary**

In the winding up of a company the applicant, an unsecured creditor, applied for an order that, *inter alia*, the decision of the Official Receiver and liquidator of the company admitting the proof of debt of the G. company as a secured creditor in preference to all other creditors of the said company be reversed. A similar application was also made by another unsecured creditor. Both applications were consolidated at the hearing and were granted. Each creditor filed a separate bill of costs for taxation and the taxing officer ruled that both bills should be taken together and that only one bill of costs should be filed. On reference to a judge.

**Held** – the two creditors were not acting extravagantly in obtaining independent advice and in appearing at the hearing of the applications and being separately represented thereat and accordingly each of them was entitled to file a separate bill of costs for taxation.

*In re Gillson*, [1948] 2 All E.R. 990, distinguished.

Ruling of the taxing officer set aside.

**Cases referred to in judgment:**

- (1) *In re Gillson*, [1948] 2 All E.R. 990.
- (2) *In re Metropolitan Coal Consumers' Association: Grieb's Case* (1890), 45 Ch. D. 606.
- (3) *English v. Bloom and London Transport Passenger Board*, [1936] 2 All E.R. 1592.
- (4) *The Bosworth* (No. 2), [1960] 1 All E.R. 729.

**Judgment**

**Mosdell J:** This is an application by a creditor of Crete Sisal and Coffee Estates Limited (in liquidation) for the ruling of the learned taxing officer dated September 8, 1962, in which he ruled that the applicant's bill of costs in Miscellaneous Civil Cause No. 14 of 1962, and that of the applicant in Miscellaneous Civil Cause No. 13 of 1962, be taken together, and that one bill of costs only be filed for taxation, to be set aside. The matter arises thus.

In the winding-up of Crete Sisal and Coffee Estates Ltd., there was an application by Lombard Banking Ltd., an unsecured creditor, in Miscellaneous Civil Cause No. 14 of 1962, and a similar application by Credit Finance Corporation Ltd., another unsecured creditor, in Miscellaneous Civil Cause No. 13 of 1962, for an order that the decision of the Official Receiver and Liquidator of Crete Sisal and Coffee Estates Ltd., dated January 13, 1962, admitting the proof of debt of the Guaranty Discount Co. Ltd., as a secured creditor in preference to all other creditors of the said company be reversed, and that the said proof be admitted, if at all, only as being in respect of an unsecured debt.

The hearings of these two applications were consolidated, and came before Murphy, J., on May 14, 1962, when Mr. O'Donovan and Mr. Dodd appeared in application No. 14 for Lombard Banking Ltd., Mr. O'Donovan also appearing with Mr. A. J. Kanji in application No. 13 for Credit Finance Corporation Ltd., Mr. N. S. Patel and Mr. H. K. Patel appearing for the Guaranty Discount Co. Ltd., the respondent to the applications, and the Official Receiver appearing in person. In his decision of June 12, 1962, Murphy, J., allowed the two applications to the extent that the Guaranty Discount Co. Ltd., was declared not to be a secured creditor, the order as to costs reading "Costs against the respondent". Lombard Banking Ltd., made an application on July 27, 1962, to the taxing officer for taxation of its bill of costs, and in a ruling dated September 18, 1962, the learned taxing officer ordered that one bill of costs only should be filed by Lombard Banking Ltd. and the Credit Finance Corporation Ltd. It was submitted by Mr. Dodd for Lombard Banking Ltd. in the instant application for reference upon taxation under r. 5 of the Advocates (Remuneration and Taxation of Costs) Rules, that the learned taxing officer had erred in law in holding that there should be one bill of costs only in respect of the two applications, and that the decision of the taxing officer should be set aside.

It is perhaps unfortunate that no application was made at the hearing before Murphy, J., for an order that two separate bills of costs be filed for taxation. The two applications were not consolidated until the hearing. The learned taxing officer, in reaching his decision that the two applicants should file one bill of costs only, relied on the judgment of Lord Greene, M.R., in *In re Gillson* (1), [1948] 2 All E.R. 990, he, *inter alia*, observing as follows:

"It was held by Lord Greene, in *In re Gillson*, [1948] 2 All E.R. 990, that where an appeal to the Court of Appeal is made and there are several parties in precisely the same interest with precisely the same arguments

who, in the court below, were separately represented, it is the duty of the

solicitors concerned to do everything possible to avoid unnecessary costs of the Court of Appeal. Where parties with precisely the same arguments come to the Court of Appeal and three separate sets of costs are incurred the practice is to allow only one set of costs.

“There is a stronger reason for one set of costs in the present two applications than there was in the *Gillson* case. Here not only the two applicants had the same interest and the same arguments but the two applications were actually consolidated.

“Interpreting the learned judge’s order for costs in the light of the decision in *Gillson*’s case, I hold that there should be one set of costs for these two applications.

“Mr. Riegels for Mr. Dodd submitted that as the two applicants had employed different advocates who in terms separately instructed Mr. O’Donovan an order for one set of costs will be unjust. With respect, I find no merit in this submission. A litigant may employ any number of counsel but unless there is a certificate for two counsel for the purpose of taxation he is deemed to have only one counsel, and in the instant case that counsel but unless there is a certificate for two counsel for the purpose of taxation he is deemed to have only one counsel, and in the instant case that counsel for both the applicants, was Mr. O’Donovan. Again in this country the two branches of the legal profession which operate separately in the United Kingdom are fused and I cannot therefore allow the fact that the solicitor’s work in any particular matter was done by a counsel other than the one who presented the case in the court to influence my assessment of costs. Even if I were entitled to take such a fact into consideration, in view of the decision in *Gillson*’s case, it would make no difference to my present ruling.”

It is advantageous to quote in full the observations of Lord Greene, M.R., in the *Gillson* case (1). They were as follows at p. 995:

“I think it is right that I should repeat what has been said many times, that when appeals are brought to this court and there are several parties with precisely the same interest and precisely the same arguments who below may have been separately represented, it is the duty of the solicitors concerned to do everything possible to avoid unnecessary costs in this court. In the present case I can see no reason why, with a little good will and with a desire to avoid multiplication of costs, one set of costs only should not have been incurred. Parties with precisely the same argument come up to this court and three separate sets of costs are incurred. The practice, in my experience, always was in such a case to allow only one set of costs, certainly where costs are being charged on residue, for instance, or on a fund the persons interested in which either are absent or are infants and, therefore, are not in a position to consent. In the present case the appeal has succeeded substantially, and we think that it is a proper case for the appellants’ costs as between solicitor and client to be paid out of the estate. Similarly, the costs of the trustees, who are necessary parties in this court, should be paid as between solicitor and client out of the estate. For the other respondents there will be one set of costs only as between solicitor and client which likewise will be paid out of the estate. The way in which that one set of costs will be treated will, of course, be a matter for the taxing master in the usual way.”

It is to be noted at once that the *Gillson* case (1), can be distinguished from the consolidated applications which were heard by Murphy, J. In the *Gillson* case (1), which was an administration action, at the hearing counsel appeared for a specific legatee and different counsel appeared for the executors, for the life tenants, for the residuary legatee and for an infant residuary legatee respectively. As the appeal substantially succeeded, it was ordered in *Gillson*’s case (1), that

the appellant's costs as between solicitor and client were to be paid out of the estate. Similarly, the cost of the trustees, who were necessary parties to the proceedings in the Court of Appeal, were to be paid as between solicitor and client out of the estate. As regards the other respondents, it was ordered that there should be one set of costs only as between solicitor and client, which likewise would be paid out of the estate. It is to be noted that the persons primarily interested in the outcome of the proceedings in *Gillson's* case (1), were the specific legatee and the executors, and it was no doubt for the latter reason that the court ordered that the other respondents should have only one set of costs. In the applications heard by Murphy, J., however, there were two separately interested creditors of the Crete Sisal and Coffee Estates Ltd., and in my view it cannot be said that Lombard Banking Ltd. and the Credit Finance Corporation Ltd. were acting extravagantly in each obtaining independent advice and in appearing at the hearing of the applications and being separately represented thereat, subject to the qualification that Mr. O'Donovan led for both of them.

Mr. Dodd relied heavily on *In re Metropolitan Coal Consumers' Association: Grieb's Case* (2) (1890), 45 Ch. D. 606, the headnote to which reads in part:

"Where the successful plaintiffs in two separate and independent actions against the same defendant, for the same object, and supported mainly by the same evidence, and in which there has been no order or agreement that the result of one shall govern the other, have been represented by the same solicitor and the same counsel, the plaintiff in each case is entitled, on the taxation of his costs of his action, to have his own action treated as entirely distinct from and independent of the other, and to have the same allowances as if the two actions had been conducted by separate solicitors and counsel, except as regards attendances or other matters which were or ought to have been done at one and the same time in both cases."

In the judgment of Kekewich, J., in *Grieb's* case (2), at p. 610, there are to be found the following pertinent observations:

"The client, Mr. Grieb, sued the company for rescission of a contract to take shares, he having been, he said, induced to take the shares by fraudulent misrepresentations, and he prevailed upon the court so to decide. In retaining a solicitor to conduct his legal proceedings, he was, in my opinion, entitled to say, I will have my case taken into court in the best possible manner: my brief shall be complete: the proofs of all the witnesses shall be complete: counsel shall be properly instructed, and you must go in to win. If the solicitor had thereupon said to him, 'I am also acting for another client, Thorsby, in a similar case against the same company and it will save a great deal of trouble and expense if I only make single copies of the documents and only examine the witnesses and look through the proofs once, and otherwise really treat the two cases as one, and that I propose to do; Mr. Grieb, as a sensible man, would have replied, 'I have nothing to do with Thorsby: you have to win my case: let Thorsby win his by you or anybody else when his case comes on; but I am entitled to the full benefit of your experience, industry, and intelligence; and you must bring it all to bear on my case'." If that is the proper view on the part of the client, of course the proper view on the part of the solicitor is that he is entitled to be paid independently – that when he brings in his bill he is entitled to charge for that experience, industry and intelligence. And if he conducts a similar case for another client, he may get his costs out of that client also, who is entitled to take precisely the same line.

"Then it is suggested that these two cases were so much alike that one necessarily governed the other, and that therefore there was no occasion



for the double expenditure. As regards that, in the first place, each case was one of fraud, and every case of fraud must stand by itself. You never know how you may be tripped up in a case of fraud; and it does not at all follow that what would be conclusive in the one case would be conclusive in the other. And, secondly, if these two cases were in any way to be regarded as governing one another, it was for the defendants to come forward and say, 'Try one: and if you succeed in one, we will immediately submit, without argument, to judgment in the other'. Of course, if that had been done, the position of the solicitor would have been entirely different."

This case certainly supports Mr. Dodd's submission that the learned taxing officer was in error in ordering only one bill of costs to be filed by the two applicants.

Mr. Patel for the Guaranty Discount Co. Ltd., referred to Halsbury's Laws of England (3rd Edn.), vol. 6, para. 1066, where it is stated:

"Costs. The court has a discretion as to costs. When a winding-up order is made, the company is usually given its costs, and one set of costs is generally given to the petitioner, another among all the creditors supporting him, and a third among the contributories supporting him. The same rule is followed when the petitioner for a compulsory order accepts a supervision order. When the petition, not being by the company, is dismissed, the petitioner generally has to pay one set of costs to the company, another set among all the creditors opposing, and a third set among all the contributories opposing; but where the petition is dismissed by consent, the costs are often paid by the company though sometimes the petitioner is ordered to pay the costs of some or all of the parties supporting and opposing, according to the circumstances."

Mr. Patel submitted that it would be absurd, had the other unsecured creditors, of whom there were many, made applications similar to those made by Lombard Banking Ltd. and the Credit Finance Corporation Ltd., if they had each been permitted to file a separate bill of costs against the Guaranty Discount Co. Ltd., which, Mr. Patel submitted, would have been the position if the ruling of the learned taxing officer were in error.

Mr. Dodd referred to two other cases, the first being *English v. Bloom and London Passenger Transport Board*, and *Siegenberg v. Bloom and London Passenger Transport Board (Consolidated)* (3), [1936] 2 All E.R. 1592; and the second being *The Bosworth (No. 2)* (4), [1960] 1 All E.R. 729. The headnote of the former reads as follows:

"A taxicab, driven by the first defendant was caught between two tramcars belonging to the second defendants. The two passengers in the cab sued both defendants. One firm of solicitors acted for both plaintiffs, and they issued two writs and separate statements of claim. Separate defences having been delivered, the actions were by order consolidated, and later the defendants paid into court with admission of liability £225 in respect of the first plaintiff's claim, and £125 in respect of the second plaintiff's claim. Judgment was given for £200 in the case of the first plaintiff and for £185 in that of the second:

**"Held:**

- (i) the issue of separate writ was a matter wholly within the discretion of the solicitors.
- (ii) the proper form of order was: Judgment for the first plaintiff for £200 with costs up to date or payment in, this plaintiff to pay the defendant's costs after that date so far as they were directly attributable to his being a party to the consolidated action. Judgment for the second plaintiff for

£185 and costs except so far as the costs of the consolidated action were directly attributable to the first plaintiff's claim. Order for payment out to the first plaintiff of £180, to the defendants of £25 of the excess paid in, the remaining £20 to be dealt with according to the taxing master's certificate. Order for payment out to the second plaintiff of £125 in part satisfaction."

The editorial note which follows the headnote is of some interest, though, of course, it is not authoritative. It reads as follows:

"Persons whose right to relief arises out of the same transaction or series of transactions may be joined in one action as co-plaintiffs, but the rule does not say that they must be joined. [Nor am I aware of any rule in Tanganyika which would require such joinder.] That is in the discretion of the parties or their advisers. On the question of the payment out it is to be noted that there were necessarily two questions to be decided, for it did not follow that each plaintiff was entitled to the same damages or that either was entitled to damages having any relation to those awarded to the other plaintiff. The question of payment out and of costs, therefore, fell to be decided as though there were still two separate actions."

The headnote to *The Bosworth (No. 2)* case (4), reads as follows:

"Two sets of plaintiffs each brought a salvage action against the same defendants in respect of the same occurrence. Each set of plaintiffs was represented by separate solicitors and counsel. The two actions were consolidated at the instance of the defendants on October 10, 1958. On October 19, 1959, when substantially all the costs save those of the trial itself (which began on November 2, and ended on November 12, 1959), had been incurred, a payment into court made by the defendants was apportioned between the two claims. During the trial certain time was occupied solely with the case of the second plaintiffs. Eventually the first plaintiffs were awarded more than their apportioned part of the sum paid in, and the second plaintiff's less than their apportioned part of this sum. The trial judge ordered the defendants to pay the first plaintiffs 'their costs of this action and of the consolidated action, *excluding those costs directly attributable to the claim of the (second plaintiffs)*'. There was no item of costs (such, e.g. as the cost of a witness giving expert evidence relevant to the cases of both sets of plaintiffs), which might have been incurred by one set of plaintiffs and have necessitated some distinction being made between what was attributed to the first or to the second plaintiffs. On appeal by the first plaintiffs.

**"Held:** – the order for costs would be varied by deleting the limiting words printed in italics above, because that limitation could refer only, in the circumstances of the case, to the first plaintiffs' costs of being represented at so much of the trial as was concerned solely with the second plaintiffs' claim and, the action having been consolidated at the instance of the defendants, the first plaintiffs were entitled to those costs as against the defendants.

*English v. Bloom and London Passenger Transport Board*, [1936] 2 All E.R. 1592, distinguished."

Mr. Patel submitted that the decisions in the *English and Siegenberg* case (3), and *The Bosworth (No. 2)* case (4), were not relevant as they concerned taxations in ordinary civil actions whereas the two applications before Murphy, J., arose out of winding-up proceedings. That is true, but I see no reason why the principles as to the assessment of, and liability for, costs in an ordinary civil action should not be applicable to the two applications merely because they arose out

of winding-up proceedings. It seems to me in accordance with *Grieb's* case (2), and the observations of Kekewich, J., which I have quoted, that both Lombard Banking Ltd. and the Credit Finance Corporation Ltd., were entitled to be separately represented at, and before, the hearing of the applications before Murphy, J., and, indeed, to file separate bills of costs. The only complication is that Mr. O'Donovan led for both of the applicants before Murphy, J. He would not seem entitled, therefore, to a full instructions fee in both applications, but rather to an adequate instructions fee apportioned equally in the two applications.

In sum, then, I hold that *Gillson's* case (1), can be distinguished from the present one, and that, in accordance with the decision in *Grieb's* case (2), Lombard Banking Ltd. and the Credit Finance Corporation Ltd., are entitled each to file a separate bill of costs for taxation.

I, therefore, order that the ruling of the learned taxing officer of September 8, 1962, be set aside, that Lombard Banking Ltd. re-submit its bill for taxation, and that a separate bill of costs be filed for taxation by the Credit Finance Corporation in Miscellaneous Civil Case No. 13 of 1962. Lombard Banking Ltd. shall have the costs of the instant application.

*Ruling of the taxing officer set aside.*

For the applicant:

*M Reigels*

*Dodd & Co., Dar-es-Salaam*

For the respondent:

*GS Patel*

*Patel & Co., Dar-es-Salaam*

## **Mwinyimadi Ramadhani v Republic** [1963] 1 EA 199 (HCT)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 30 April 1963                             |
| <b>Case Number:</b>      | 150/1963                                  |
| <b>Before:</b>           | Weston, Biron and Reide JJ                |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Statute – Construction – Interpretation of words “offence . . . in respect of any animal” in Fauna Conservation Ordinance – Fauna Conservation Ordinance (Cap. 302), s. 2, s. 47 (1), s. 49 (1) and s. 53 (1) (i) and (ii) (T.).*

[2] *Game – Unlawful possession of government trophies – Sentence – First offender – Sentence of fifteen months’ imprisonment – Whether sentence imposed valid – Fauna Conservation Ordinance (Cap.*

302), s. 2, s. 47 (1), s. 49 (1) and s. 53 (1) (i) and (ii) (T.).

### **Editor's Summary**

The appellant was convicted of having unlawful possession of Government trophies contrary to s. 49 (1) of the Fauna Conservation Ordinance. He was sentenced to fifteen months' imprisonment and fined Shs. 30,000/- or six months' imprisonment in default in addition to which the trophies were forfeited to the Government. On appeal against this sentence, it was contended for the appellant that the offence was not one committed "in respect of any animal" within sub-para. (i) of s. 53 (1) so that the appellant fell to be sentenced under sub-para. (ii) of s. 53 (1) with the result that, being a first offender, the appellant was not liable to imprisonment for a term exceeding six months. Section 53 (1) (i) of the Ordinance provides, *inter alia*, that if an offence against the Ordinance "is committed within any game reserve or controlled area or in respect of any animal for which the fee for supplementary game licence as

specified from time to time in the Third Schedule exceeds one hundred shillings” the offender should be liable on conviction to a fine of twenty thousand shillings or to imprisonment for two years, or to both such fine and imprisonment. It was conceded by the respondent that the offence was not committed within a game reserve or a controlled area, but, it was argued, it was one committed in respect of animals – elephants and rhinoceros – for which the fee for a supplementary game licence exceeded Shs. 100/-; and accordingly it was within the magistrate’s power to award the term of imprisonment which he did.

**Held –**

- (i) the word “animal” in s. 53 (1) (i) of the Fauna Conservation Ordinance cannot be construed to include its trophies.
- (ii) the expression “offence . . . in respect of any animal” in s. 53 (1) (i) *ibid.* does not include an offence in relation to any animal from which a trophy, the subject matter of the charge, must at some time in the past have been severed;
- (iii) the offence committed by the appellant was an “other case” within the meaning of s. 53 (1) (ii) *ibid.*, and, as the maximum term of imprisonment that could have been imposed upon the appellant under that section was six months, the sentence of fifteen months’ imprisonment was not valid.

Sentence of imprisonment varied by reduction to six months’ imprisonment.

**Cases referred to in judgment:**

- (1) *Saleh s/o Issa v. R.*, Tanganyika High Court Criminal Appeal No. 134 of 1961 (unreported).
- (2) *R. v. Omari s/o Kindamba and Others*, [1960] E.A. 407 (T.).
- (3) *London County Council v. Aylesbury Dairy Co.* (1898), 77 L.T. 440.
- (4) *Proctor v. Manwaring*, 106 E.R. 616.

April 30. The following judgments were read:

**Judgement**

**Weston J:** The appellant was convicted in the district court of Dar-es-Salaam District at Dar-es-Salaam on his plea to a count laid under s. 49 (1) of the Fauna Conservation Ordinance (Cap. 302) charging him with being in unlawful possession of Government trophies, namely 1,454 lb. of elephant tusks and 80 lb. of rhinoceros horns, the total value of which was Shs. 23,742/-. He was sentenced to fifteen months’ imprisonment and fined Shs. 3,000/- or six months’ imprisonment in default, and the trophies were forfeited to Government. This is an appeal against that sentence.

The penalties and forfeitures for offences against the Ordinance where punishment is not specifically mentioned – and the offence to which the appellant pleaded is one such offence – are provided for in s. 53. The material part of sub-s. (1) of this section, which alone is here relevant, reads as follows:

“Any person who –

- (a) contravenes any provision of this Ordinance . . .

shall, if the same be stated herein to be an offence against this Ordinance (and no other punishment is specified herein) –

- (i) if the offence is committed within any game reserve or controlled area or in respect of any animal specified from time to time in the First Schedule or in respect of any animal for which the fee for a supplementary game licence, as specified from time to time in the Third Schedule hereto, exceeds one hundred shillings, be liable on conviction to a fine of twenty thousand shillings or to imprisonment for two years, or to both such fine and imprisonment; or

- (ii) in any other case, be liable on conviction to a fine of ten thousand shillings or to imprisonment for six months or to both such fine and imprisonment, or, in the case of a subsequent offence, to a fine of fifteen thousand shillings or to imprisonment for nine months, or to both such fine and imprisonment.”

The sentence imposed on the appellant, therefore, in so far as it consisted of fifteen months’ imprisonment, could have been validly imposed only if the offence before the court was one punishable under sub-para. (i) of this sub-section.

It is conceded by the Republic that the offence was not committed within a game reserve or a controlled area, but, it is argued, it was one committed in respect of animals – elephant and rhinoceros – for which the fee for a supplementary game licence as specified in the Third Schedule to the Ordinance exceeded Shs. 100/-, and accordingly it was within the learned magistrate’s power to award the term of imprisonment which he did.

Mr. Fraser Murray for the appellant contends that the offence was not one committed in respect of any animal within the meaning of sub-para. (i), so that the appellant fell to be punished under sub-para. (ii) with the result that being a first offender he was not liable to imprisonment for a term exceeding six months.

In *Saleh s/o Issa v. R.* (1), Tanganyika High Court Criminal Appeal No. 134 of 1961 (unreported), in which the appellant had pleaded guilty to unlawful possession of two elephant tusks contrary to s. 49 (1) of the Fauna Conservation Ordinance and had been sentenced to eighteen months’ imprisonment, it was argued for the appellant that this term was ultra vires the court, not indeed on the ground that the offence was not one committed in respect of any animal (as is argued here) but on the narrower ground that the offence was not one committed in respect of any live animal. The learned Chief Justice disposed of this submission in the following terms:

“The first contention raised for the appellant is that the possession of elephant tusks, already severed (as these were) from an elephant, cannot be said to be an offence in respect of an animal at all, since ‘animal’ must mean a living animal. I do not think this contention can prevail. The definition of ‘animal’ in the Ordinance is of no assistance on the point. But the appellant’s offence under s. 49 (1) was the unlawful possession of Government trophies, and a ‘trophy’ is defined as meaning ‘any animal, alive or dead, and any horn, ivory, tooth, tusk, bone, claw, hoof, skin, hair, feather, egg or other durable portion whatsoever of any animal, whether processed or not, provided that it is readily recognizable as a durable portion of an animal’.

“It is undisputed that severed elephant tusks are trophies within the above definition. But the definition makes it equally clear, to my mind, that to be unlawfully in possession of a trophy is an offence committed, for the purpose of the Ordinance, in respect of an animal, whether or not the animal from which the trophy (if it is a part of an animal such as a tusk) has been severed is alive or dead at the time when the accused is found in possession of it.”

The appeal was decided, however, on another ground which is not relevant here and to which, for this reason, it is not necessary to refer. But it follows that in strictness the learned Chief Justice’s remarks were obiter, so that, although it hardly needs to be said that any pronouncement on a point of law coming from such a source must be treated with the very greatest respect, the opinion which I have just quoted does not relieve this court from its duty to consider the matter afresh, especially as Mr. Fraser Murray’s submission in this case

differs materially, if subtly, from that advanced by learned counsel in *Saleh Issa's* case (1).

Considering learned counsel's contention then, unfettered by authority, the appellant's offence was, as has been said, the unlawful possession of a number of elephant tusks and a quantity of rhinoceros horn. These, as we shall see, are indisputably trophies within the meaning of the Ordinance. *Prima facie*, therefore, the appellant's was an offence committed in respect of such trophies (see *R. v. Omari s/o Kindamba and Others* (2), [1960] E.A. 407 (T.)), and it seems to me that it could not properly be said to be one committed in respect of any animal unless either (a) the word "animal" appearing in sub-para. (i) of s. 53 (1) of the Ordinance is defined in terms wide enough or is otherwise apt to include the trophies of such animal, or (b) the expression "offence . . . in respect of any animal" appearing in that sub-paragraph can be said to mean not only an offence in relation to any animal the subject matter of a charge but also an offence in relation to any animal from which a trophy the subject matter of a charge must at some time in the past have been severed.

As to (a), "animal" is defined in s. 2 of the Ordinance as follows:

" 'animal' means any kind of vertebrate animal and the eggs and young thereof, other than domestic animals and, except as in s. 5 (1) and s. 17 expressly provided, fish",

and "trophy" is, in the same section, defined thus:

" 'trophy' means any animal, alive or dead, and any horn, ivory, tooth, tusk, bone, claw, hoof, skin, hair, feather, egg or other durable portion whatsoever of any animal, whether processed or not, provided that it is readily recognizable as a durable portion of an animal."

Far from it being true then to say that the word "animal" is defined in terms wide enough to include its trophies, the word "trophy" is the wider of the two terms, for every animal is a trophy but not every trophy is an animal. Furthermore, the Ordinance consistently distinguishes between the animal and its trophy and there is not, I think – ignoring s. 53 for the moment – a single provision in the Ordinance in which the word "animal" is used to mean anything but animal as defined in s. 2, that is, the animal as distinct from any part of it being a trophy. In no such provision, indeed, is this distinction more clearly drawn than in s. 47 (1) in which Government trophies are defined as follows:

- "(a) any game animal which has been killed or captured without a licence and the trophy of any such animal;
- (b) any game animal found dead and the trophy of any such animal or any part of any game animal which is found;
- (c) any animal killed or captured in contravention of any of the provisions of this Ordinance and the trophy of any such animal;
- (d) any trophy in respect of which a breach of the provisions of this Ordinance has been committed;
- (e) any animal or trophy which is in the possession of any person and which may be reasonably suspected of having been stolen or unlawfully obtained, and in respect of which such person is unable to give an account to the satisfaction of the game warden or of any other person authorized by him in that behalf as to how he came by the same;
- (f) any elephant tusks weighing less than twenty-two pounds the pair, or eleven pounds in the case of an elephant having a single tusk, or



- such other weight as may be prescribed in respect of the whole Territory or of any particular area;
- (g) any other animal or trophy which may be prescribed.”

It would be strange indeed if in s. 53 of the Ordinance which is, as has been said, the general penalties and forfeitures section, the word “animal” were used, or, I would say, were even intended to be used to include its trophies. For, if it had been the intention to impose the higher penalties for offences in respect of the trophies of the animals mentioned in sub-para. (i) of sub-s. (1) of the section as opposed to the animals themselves, effect could quite easily have been given to it by express reference to such trophies, as express reference to trophies is made in every other provision of the Ordinance intended to apply to them.

In my view, then, the word “animal” standing alone in the context under consideration cannot be construed to include its trophies.

Turning now to (b), the argument that the expression “offence . . . in respect of any animal” appearing in sub-para. (i) of s. 53 (1) of the Ordinance includes an offence in relation to any animal from which a trophy the subject matter of a charge must at some time in the past have been served, is one which, with respect, I cannot accept. In my view such an interpretation is wrong in principle and bad in law.

It is firstly wrong in principle because it offends against that fundamental canon of interpretation of penal statutes which Wright, J., in *London County Council v. Aylesbury Dairy Co.* (3) (1898), 77 L.T. 440 at p. 442, stated thus:

“Certainly I have always understood it to be the rule that, where there is any enactment which may entail penal consequences you ought not . . . to do violence to the language in order to bring people within it, but ought to take care that no-one is brought within it who is not within its express language.”

It seems to me that it can only be by doing violence to the language of the expression under consideration that it can be held capable of having the meaning suggested. What “offence” indeed can be said to have been committed by a person found guilty of having an elephant tusk unlawfully in his possession today, in respect of the elephant from which it was severed, possibly quite lawfully, years before, by some third party unknown? The answer may perhaps be found within the covers of some treatise on morals or civics. I confess I know of none that would leave the word “offence” with any meaning acceptable to a court of law engaged in the stern and practical business of construing a penal statute.

Again, the words “in respect of any animal” have in law their plain and ordinary meaning of “in relation to any animal”. If this be so, and it is not disputed that it is, what relationship is there between the offence committed by a person having unlawful possession of an elephant tusk *today* and the elephant from which it was severed years before by some third party? And once more I must say that whilst there may well be some connection that a moralist might be able to discern, I know of no nexus between the two which a court of criminal jurisdiction could properly notice.

So much for the principle. Referring next to the authorities, in *R. v. Omari s/o Kindamba and Others* (2), ten persons were convicted of hunting animals in a controlled area without the written permission of a game warden previously sought and obtained, contrary to s. 11 (1) (a) of the Fauna Conservation Ordinance. The trial magistrate, purporting to act under s. 53 (2) of the Ordinance, ordered that the guns and bows and arrows used by the convicted persons be forfeited to the Government. Two of these persons petitioned

Government for the return of their shotguns and the matter was referred to this court for consideration in its revisional jurisdiction.

Section 53 (2) – it has since been amended – read as follows:

“When any person is convicted of an offence against this Ordinance, the court may order that any animal, meat, trophy, trap, weapon, poison, vehicle or instrument in respect of which the offence has been committed shall be forfeited to the Government.”

It was held – I quote from the headnote – that

“the order of forfeiture was invalid as s. 53 (2) aforesaid only allows the forfeiture of a weapon in respect of which an offence has been committed. In this particular case, the weapons were only involved collaterally in the offence, and did not form the subject-matter of the offence”.

In his judgment Law, J., said:

“On a literal interpretation, the words ‘in respect of which the offence has been committed’ must, in my view, refer to the subject-matter of the offence, and not to things indirectly or incidentally connected with the commission of the offence. Similar words were considered by the Court of Appeal for Eastern Africa in *Modhaf v. R.* (1956), 23 E.A.C.A. 546, and that court interpreted the words ‘goods in respect of which such offence has been committed shall be liable to forfeiture’ which occur in certain sections of the E.A. Customs Management Act, 1952, as being restricted to goods which form the subject-matter of the charge and not as extending to goods which happen to be together with the goods forming the subject-matter of the charge. Where, in the same Act, the legislature intended to confer a general power to forfeit things used in the commission of the offence, a different wording was used. For instance, s. 157 of the Act authorizes the forfeiture of the package in which goods liable to forfeiture are contained, and even the forfeiture of other goods in the same package. Section 156 authorizes the forfeiture of conveyances and animals used for the movement of goods liable to forfeiture. As Briggs, J.A., pointed out, there is a contrast between ‘goods in respect of which an offence has been committed’ and ‘goods seized by reason of the commission of an offence’. The learned Justice of Appeal said: ‘The latter phrase, but not the former, includes goods only involved collaterally in the offence.’ The former phrase applies only to goods which form the subject-matter of the offence.”

So here, in my view, the expression “offence . . . in respect of any animal” means an offence in relation to any animal the subject matter of the charge and no other.

For these reasons Mr. Fraser Murray’s submission is, in my opinion, sound. The offence committed by the appellant was, as he contends, an “other case” within the meaning of sub-para. (ii) of s. 53 (1) of the Ordinance, and the maximum term of imprisonment that could properly have been imposed upon the appellant under that sub-paragraph was six months.

Accordingly, I would allow this appeal to the extent of setting aside the sentence of fifteen months’ imprisonment imposed on the appellant and substituting one of six months’ imprisonment in its place, and in this connection I respectfully adopt the sentiment expressed by Wright, J., in the *Aylesbury Diary Company* case (3) and say, “If there be mischief consequent upon the ruling which we are bound to adopt, that is something which must be removed by application to Parliament and nobody else.”

**Biron J:** I agree with the conclusions reached by my brother Weston and the order proposed by him, and have very little to add.

Although the legislature may well have intended that such an offence as unlawful possession of elephant tusks or rhinoceros horn should attract the higher penalty provided for in s. 53 (1) (i) of the Ordinance, as the submission of Mr. Taylor, who appeared for the Republic, that the section is designed to protect, *inter alia*, certain classes of animals which include the elephant and the rhinoceros cannot lightly be dismissed, the point for determination, however, is not what the legislature intended but what it enacted. The section is a penal section, and as stated by Abbott, C.J., in *Proctor v. Manwaring* (4), 106 E.R. 616:

“This being a penal clause in this Act of Parliament, must not be extended by construction, and though there may be cases suggested, falling within the mischief intended to be prevented by the legislature, yet, if they had not used proper words, so as to include them within the prohibition, it is not competent for the court to extend the Act of Parliament to them by construction.”

Or as stated in Maxwell on Interpretation of Statutes (16th Edn.), p. 264:

“If the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to a court to extend them.”

The terms “trophy”, “Government trophy” and “animal” are all expressly defined in the Ordinance. The court cannot give a wider meaning to any of these terms than that given by the Ordinance. As for the expression “in respect of any animal specified”, etc., in the section, Mr. Taylor submits that it lends itself to two interpretations, a narrower one, i.e. in respect of any specified animal simpliciter, or a wider one, as relating to or referring to any such animal; to embrace and include the animal from which the trophy emanated. Learned state attorney canvasses the wider interpretation as being, to quote his words, “the ordinary interpretation to be given to the expression”. He calls in aid the definition of “in respect of” given in the Shorter Oxford English Dictionary as “referring to” or “relating to”. I fail to see how such definition supports his proposition. To say that the expression refers to or relates to the trophy from an animal still entails giving the word “animal” an extended meaning to include part of an animal, which is wider than the definition given by the Ordinance itself, which definition must naturally prevail.

With respect, I agree with the submission of Mr. Fraser Murray that the ordinary meaning of the expression “in respect of any animal”, etc., which is the one which must be adopted, is that which Mr. Taylor calls the narrow interpretation.

If, as submitted by Mr. Taylor, such interpretation could or would lead to the absurd results so graphically depicted by him, the remedy lies with Parliament, not with the court.

**Reide J:** I too agree with the conclusions reached by my brother Weston and adopt the observations of my brother Biron in his concurring judgment. I would allow the appeal and substitute the sentence proposed.

*Sentence of imprisonment varied by reduction to six months’ imprisonment.*

For the appellant:

*WD Fraser Murray*

*Fraser Murray, Thornton & Co., Dar-es-Salaam*

For the respondent:

*AE Taylor (State Attorney, Tanganyika)*

*The Director of Public Prosecutions, Tanganyika*

**Leonard Aniseth v Republic**  
**[1963] 1 EA 206 (CAD)**

**Division:** Court of Appeal at Dar-Es-Salaam  
**Date of judgment:** 1 March 1963  
**Case Number:** 161/1962  
**Before:** Sir Ronald Sinclair P, Sir Trevor Gould Ag VP and Newbold JA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Tanganyika – Otto, Ag. J

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*[1] Criminal law – Alibi – Defence – Whether accused putting forward defence of alibi assumes any burden of proof.*

**Editor’s Summary**

The appellant was convicted of murder. His defence at the trial was an alibi. Relying on certain observations of the Court of Appeal in *R. v. Chemulon Wero Olango* (1937), 4 E.A.C.A. 46, the learned judge said in his judgment

“... that the burden of proof with regard to alibi is on the person setting up that defence to account for so much of the time of the transaction in question as to render it impossible that he could have committed the imputed act”.

The judge also directed the assessors in similar terms.

On appeal.

**Held –**

- (i) the judge misdirected both himself and the assessors as to the onus of proof when dealing with the defence of an alibi and wrongly admitted evidence of the contents of letters which were not produced.
- (ii) however, there was no failure of justice since both the judge and the assessors clearly accepted the evidence of the prosecution witnesses and had there been no misdirection and no wrongful admission of evidence both the judge and the assessors would still necessarily have arrived at the same conclusion as to the guilt of the appellant.
- (iii) in so far as a passage in the judgment in *R. v. Chemulon Wero Olango* (1937), 4 E.A.C.A. 46, suggests that any burden of proof rests on the defence when the defence is an alibi, it is clear in view of the decisions in *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 and *R. v. Johnson*, 46, Cr. App. R. 55, that such suggestion is no longer good law and should not be followed.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *R. v. Chemulon Wero Olango* (1937), 4 E.A.C.A. 46.
- (2) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; [1935] All E.R. Rep. 1.
- (3) *R. v. Johnson*, 46 Cr. App. R. 55; [1961] 3 All E.R. 969.
- (4) *R. v. Finch*, 12 Cr. App. R. 77.

**Judgement**

**Sir Ronald Sinclair P:** read the following judgment of the court: The appellant was convicted by the High Court of Tanganyika of the murder of Cresencia d/o Frederico on the night of May 8, 1962. We dismissed his appeal and now give our reasons for so doing.

It was established by the evidence that the appellant had been married to the deceased for many years, but some five years prior to her death she left the appellant and continued to live separately from him until her death. On the day of her death she was living in the house of her father, Frederico, in Lubeo Village which was some thirty minutes' walk from the village where the appellant lived. On that day at about 8.00 p.m., some person entered Frederico's house, brutally murdered Frederico and the deceased and severely injured a third person, Kabinaga, with a panga.

The case against the appellant was a strong one. Kabinaga gave evidence that at about 8.00 p.m. on May 8, he was sitting in the kitchen of Frederico's house with the deceased, Frederico then being nearby in the store room, when the appellant, whom he knew, entered carrying a panga. There was a fire and a wick lamp in the kitchen and, he said, he saw the appellant very clearly. The appellant immediately started slashing the deceased with the panga on the back and side of her neck and on the front of her head. The appellant then attacked him, Kabinaga, with the panga and he collapsed on the ground later becoming unconscious.

At about 9.00 p.m. Frederico's son, Laurian, as a result of information received, went to his father's house where he found the dead body of his father at the back door and the dead body of the deceased in the kitchen with Kabinaga lying by her side severely injured.

Two independent witness, Joseph and Francis, who lived in a village less than half a mile from Lubeo Village and between that village and the village in which the appellant live, testified that at about 8.30 p.m. or 9.00 p.m. on the May 8, they went to Lubeo Village in response to an alarm. On the way they met someone running away from the direction of Lubeo Village. They called to this person who answered that people were killing one another in Lubeo Village. It was too dark to identify the person but both recognised the voice as being that of the appellant. Both were familiar with his voice, one having known him since childhood.

From the time when the deceased left him up to the time of her death the appellant had been persistently endeavouring to get her to return to him but Frederico refused to allow her to do so. There was evidence that this resulted in bad feeling between the appellant and Frederico. Two letters admittedly written by the appellant to Frederico at the end of 1957, were put in evidence. They contained veiled threats against both Frederico and the deceased. Reference was also made by Laurian to more recent letters, which he described as threatening, alleged to have been received by Frederico from the appellant. Those letters were not produced – they were not found amongst Frederico's effects – but Laurian said he read some of them. The appellant denied writing any such letters. As to the letters which Laurian did read, he did not say that he knew the appellant's handwriting and he gave no evidence as to their contents beyond referring to them as threatening letters. In the circumstances we do not think it was established that the letters were written by the appellant; even if they were, it was clearly dangerous to attach any weight to such vague evidence as to their contents. As to the letters which Laurian did not read, his evidence as to the authorship and contents of the letters was hearsay and inadmissible. He referred in particular to one letter which he said was received by Frederico from the appellant in February, 1962. He said it was read to him by his father and that it contained a statement that after Easter the appellant would "come and make celebrations" at his father's house. He took this to be a threat to commit murder. The alleged contents of this alleged letter from the appellant were referred to by the first assessor when giving his opinion. As we have said, the evidence relating to this letter was completely inadmissible.

The appellant's defence was an alibi. He gave evidence on oath in which he said that on the night of May 8, he returned to his house at about 7.30 p.m. and after taking food went to bed at about 8.30 p.m. He did not wake until about 10.00 p.m. when the alarm was raised. His alibi was supported by his second wife, Teresa, who shared the same bedroom with him and to some extent by his son, Silvanus, who slept in another room and said he did not hear his father go out that night.

The learned judge, however, seriously misdirected both himself and the assessors as to the onus of proof when dealing with the defence of an alibi. In his judgment he said:

“ . . the burden of proof with regard to alibi is on the person setting up that defence to account for so much of the time of the transaction in question as to render it impossible that he could have committed the imputed act. This, of course, is not a heavy burden, and it is still for the prosecution to prove their case beyond all reasonable doubt. It is only necessary on behalf of the accused that there should be such evidence as to raise a reasonable probability that the facts on which he relies do exist.”

He directed the assessors in similar terms.

The first sentence of that passage is clearly based on certain observation of this court in *R. v. Chemulon Wero Olango* (1) (1937), 4 E.A.C.A. 46, at p. 47, where it was said:

“ . . when one considers the burden there is on a person setting up the defence of an alibi to account for so much of the time of the transaction in question as to render it impossible that he could have committed the imputed act . . .”

Since the well-known decision of *Woolmington v. Director of Public Prosecutions* (2), [1935] A.C. 462, it is well settled that subject to the defence of insanity and to certain statutory exceptions which are not relevant to the present case no burden rests upon an accused person to establish any defence. In the recent case of *R. v. Johnson* (3), 46 Cr. App. R. 55, the Court of Criminal Appeal dealt specifically with the burden of proof when a defence of an alibi is raised. The headnote of that case reads:

“Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case.”

In an earlier case, *R. v. Finch* (4), 12 Cr. App. R. 77, it was held that where the defence is an alibi the jury should be directed that they cannot convict unless they definitely reject it. In other words, if the evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person, it is sufficient to secure an acquittal. Although the trial judge stated that it was still for the prosecution to prove their case beyond reasonable doubt it is implicit in the passage from the judgment which we have quoted that some burden rested upon the appellant to establish the alibi.

After careful consideration of the evidence, the opinions of the assessors and the judgment, however, we were satisfied that the misdirection as to the onus of proof and the wrongly admitted evidence as to the letters which were not produced did not occasion any failure of justice. As to the evidence relating to the letters which were not produced, apart from the two letters which were produced, there was other admissible evidence that the appellant bore enmity

towards both Frederico and the deceased and the appellant himself admitted that he tried “all means of persuasion and threats” to get his wife back up to her death. It is also quite clear from the judgment and the opinions of the assessors that both the judge and the assessors accepted the evidence of Kabinaga, Joseph and Francis and definitely rejected that of the appellant and his witnesses as to the alibi. Once the evidence of Kabinaga, Joseph and Francis was accepted, the conviction of the appellant was inevitable. In those circumstances we had no doubt that had there been no misdirection and no wrongful admission of evidence both the judge and assessors would still necessarily have arrived at the same conclusion as to the guilt of the appellant.

In so far as the passage referred to in *R. v. Chemulon Wero Olango* (1), suggests that any burden rests on the defence when the defence is an alibi, it is clear from the other cases quoted, particularly *Johnson*, that such suggestion is no longer good law and should not be followed.

*Appeal dismissed.*

The appellant did not appear and was not represented.

For the respondent:

*KRK Tampi* (State Attorney, Tanganyika)

*The Director of Public Prosecutions*, Tanganyika

## **Kiondo Hamisi v Republic** [1963] 1 EA 209 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 13 March 1963                             |
| <b>Case Number:</b>      | 92/1963                                   |
| <b>Before:</b>           | Spry J                                    |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Criminal law – Possession of property suspected to have been unlawfully obtained – Omission to adduce evidence of circumstances of detention of accused – Burden of proof to satisfy court that property not stolen or unlawfully obtained – Penal Code (Cap. 16), s. 312 (T.) – Criminal Procedure Code (Cap. 20), s. 24 (T.).*

### **Editor’s Summary**

The appellant was convicted under s. 312 of the Penal Code of having in his possession property suspected of having been stolen or unlawfully obtained. The charge stated that the accused had been detained by the police under s. 24 of the Criminal Procedure Code, and that he had in his possession a



radio reasonably suspected of being stolen and had failed to give a satisfactory account of how he came by the same. At the trial no evidence was given of the detention of the appellant nor that he had the radio when he was detained. On appeal

**Held –**

- (i) a charge under s. 312 of the Penal Code should allege that the accused was detained in exercise of the powers conferred by s. 24 of the Criminal Procedure Code and that at the time when he was, detained he was conveying or was in possession of (as the case may be) a specified thing which might reasonably be suspected of having been stolen or unlawfully obtained, but it should not allege that the accused had failed to account for his possession of that thing because the obligation to account does not arise until the accused is before the court.
- (ii) the fatal defect in the proceedings was that the constable who detained the appellant was not called to give evidence and there was no evidence of the detention and no proof that the radio had been in the possession of the appellant at the time when he was detained.

- (iii) where it is proved that an accused has been detained under s. 24 of the Criminal Procedure Code and that he had at that time in his possession property which may be reasonably suspected of having been stolen or unlawfully obtained, the burden shifts to the accused to satisfy the court how he came by the same; this burden, however, is not a heavy one.
- (iv) in using the words “give an account” in s. 312 of the Penal Code the legislature must be regarded as having imposed a lesser burden, and if the court is satisfied that the accused’s explanation is reasonably probable in the circumstances the accused is entitled to acquittal, even though an alternative explanation may be slightly more probable.
- (v) in proceedings under s. 312 *ibid* the court is concerned with the question whether the thing which was in the possession of the accused is of such a nature or the circumstances were such that a reasonable suspicion arises that it was stolen, and the more ordinary the thing in relation to the apparent standing and way of life of the accused, the less likely will it be that the court will regard the suspicion as reasonable.

Appeal allowed. Conviction quashed and sentence set aside.

#### **Cases referred to in judgment:**

- (1) *R. v. Msengi s/o Abdallah* (1952), 1 T.L.R. (R.) 107.
- (2) *R. v. Huku bin Katega and Others* (1934), 1 T.L.R. (R.) 16.
- (3) *George s/o Lerai v. R.* (1952), 1 T.L.R. (R.) 366.
- (4) *Harabu s/o Abdallah v. R.* [1962] E.A. 457 (T.).
- (5) *R. v. Carr-Briant*, [1943] 2 All E.R. 156.
- (6) *R. v. Dunbar*, [1957] 2 All E.R. 737.
- (7) *R. v. Patterson*, [1962] 2 Q.B. 429; [1962] 1 All E.R. 340.

#### **Judgment**

**Spry J:** At the hearing, I allowed this appeal, quashed the conviction and set aside the sentence. I now give my reasons.

The appellant was charged under s. 312 of the Penal Code (Cap. 16), that being a person who had been detained under s. 24 of the Criminal Procedure Code (Cap. 20), he had in his possession a radio reasonably suspected of being stolen and had failed to give a satisfactory account of how he came by the same.

I would observe in passing that a charge under s. 312 should allege that the accused was detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code and that at the time when he was detained he was conveying or was in possession of (as the case may be) a specified thing which might reasonably be suspected of having been stolen or unlawfully obtained. It should not allege that he failed to account for his possession of that thing because the obligation to account does not arise until the accused is before the court.

The fatal defect in the proceedings was that the constable who detained the appellant was not called to

give evidence. There was no evidence of the detention (apart from hearsay) and no proof that the radio had been in the “possession” of the appellant at the time when he was detained. It should be borne in mind that “possession” in this context must be read ejusdem generis with “conveying” that is to say, that the possession must be possession in the course of a journey. (See *R. v. Msengi s/o Abdallah* (1) (1952), 1 T.L.R. (R.) 107, explaining and qualifying *R. v. Huku bin Katega and Others* (2) (1934), 1 T.L.R. (R.) 16.) In the absence of evidence that the appellant was detained while in possession of the radio, the conviction clearly could not be upheld.

There was a further defect in the proceedings. The only witness for the prosecution, a police constable, said that the appellant had claimed that he bought the radio from the shop of one Abdul Hashim. The witness said that he went with the appellant to the shop and that the proprietor had denied selling the radio to the appellant and had further stated that he did not sell radios of the particular make. This was hearsay evidence and not admissible. The proper course would, of course, have been to call Abdul Hashim to rebut the explanation offered by the appellant.

There was a third irregularity. The appellant elected to make and made from the dock a statement not on oath. The record then reads:

“Accused says he does not wish to call witnesses. On enquiries re accused’s alleged witnesses I am informed that accused has been arrested on suspicion, and that he had been released from prison a week before his arrest. Accused admits this.”

Once the appellant, having been informed of his rights, had clearly stated that he did not wish to call any witness, that was an end of the matter. The magistrate had no right to make enquiries, presumably of the prosecution, regarding the appellant’s “alleged witnesses”. This elicited the statement that the appellant had been in prison, which was inadmissible and highly prejudicial. The only reason which would have justified the introduction of evidence as to bad character would have been the calling by the accused of evidence as to his own good character, a course which he had not adopted. Had that situation arisen, it would have been for the prosecution to seek leave to call evidence in rebuttal *ex improviso*, but it did not arise in this case.

Before this appeal was received, the trial magistrate had forwarded the record of the proceedings to this court and asked, for his guidance in future cases, where the burden of proof lies in cases under s. 312.

It is clear that where it is proved that a person has been detained under the powers conferred by s. 24 of the Criminal Procedure Code and that he had at that time in his possession property which may be reasonably suspected of having been stolen or unlawfully obtained, the burden shifts to him of satisfying the court as to how he came by the same. The burden is not, however, a heavy one. Sinclair, Ag. C.J. (as he then was) said in the case of *George s/o Lerai v. R.* (3) (1952), 1 T.L.R. (R.) 366:

“Where a person charged under this section gives no account to the court of how he came by the property, or gives an account which is false or unreasonable, he is clearly not giving an account to the satisfaction of the court and the court is entitled to convict. But where he gives an account which might reasonably be true and which is consistent with innocent possession, he is, in my view, entitled to be acquitted. The section does not require him to *prove* that he came by the property honestly.”

With that view I respectfully agree.

In the later case of *Harabu s/o Abdallah v. R.* (4), [1962] E.A. 457 (T.) Weston, J., remarked:

“... the onus is upon him (that is, the accused) to satisfy the court on balance of probabilities that such property was not stolen or unlawfully obtained.”

This observation was made obiter and, with respect, I think it places the onus on the accused too high. It would seem to accord with the decisions in the English cases of *R. v. Carr-Briant* (5), [1943] 2 All E.R. 156, *R. v. Dunbar* (6), [1957] 2 All E.R. 737, and *R. v. Patterson* (7), [1962] 2 Q.B. 429. I think,

however, that there is a distinction to be drawn. *Carr-Briant's* case (5), was under the Prevention of Corruption Acts, 1906 and 1916, under which a presumption arises against the accused "unless the contrary is proved". *Dunbar's* case (6), concerned the defence of diminished responsibility in relation to which the Homicide Act, 1957, provides that "it shall be for the defence to prove" that by virtue of the section the accused is not guilty of murder. *Patterson's* case (7), concerned the possession of housebreaking implements by night, which under the Larceny Act, 1916, constitutes an offence unless there is "lawful excuse (the proof of which shall lie on such person)". In all these cases, the burden of proof on the accused was held to be to establish "a balance of probabilities". It will be observed, however, that all these statutes used the word "prove" or cognate words, and this, I think, constitutes the distinction. If the legislature had intended to impose that burden of proof in relation to s. 312, the word "prove" would surely have been used. In using the words "give an account" the legislature must be regarded as having imposed a lesser burden, and if the court is satisfied that the accused's explanation is reasonably probable in the circumstances, the accused is entitled to acquittal, even though the alternative explanation may be slightly more probable.

In this connection, I would observe that although the reason why a police officer who has exercised the powers conferred by s. 24 was suspicious is not necessarily relevant to proceedings under s. 312 (see *Msengi's* case (1)), the court is, in my opinion, concerned with the quite different question whether the thing which was in the possession of the accused is of such a nature or the circumstances were such that a reasonable suspicion arises that it was stolen and, obviously, the more ordinary the thing is in relation to the apparent standing and way of life of the accused, the less likely it will be that a court will regard suspicion as reasonable. If the court, after hearing the evidence for the prosecution, does not consider that a reasonable suspicion arises, it will not even call on the accused for an explanation. To hold otherwise would, in my view, be to give no meaning to the word "reasonably" in s. 312, which, as a provision striking at the liberty of the individual must be most strictly construed. This view also accords with the general principle in all criminal trials that the accused is only put on his defence after a *prima facie* case has been shown.

In conclusion, it may be convenient to summarise the matters on which the trial magistrate is required to make a finding in his judgment before he can properly convict. They are:

Firstly, that the accused was in fact detained in exercise of the powers conferred by s. 24 of the Criminal Procedure Code;

Secondly, that at the time when he was so detained, he was in the course of a journey (whether or not in a street, or on private land, or in a building);

Thirdly, that at the time when he was so detained, he had in his possession (that is to say, with him) a particular thing;

Fourthly, that such thing was of such a nature or the circumstances were such that it might reasonably be suspected of having been stolen or unlawfully obtained; and

Fifthly, that the accused had refused to give an account to the court of how he came by the thing or gave an account which was so improbable as to be unreasonable or gave an account which was rebutted by the prosecution.

*Appeal allowed. Conviction quashed and sentence set aside.*

The appellant did not appear and was not represented.

For the respondent:

*KRK Tampi* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

**Edward Kironde Kaggwa v L Costaperaria and another**  
[1963] 1 EA 213 (HCU)

**Division:** High Court of Uganda at Kampala  
**Date of judgment:** 22 April 1963  
**Case Number:** 166/1962  
**Before:** Slade J  
**Sourced by:** LawAfrica

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*[1] Practice – Third party procedure – Summons for directions following issue of third party notice – Action against defendant for trespass upon land – Allegation that defendant entered upon land under licence granted by third party – Liability of third party to make contribution or indemnity – Whether there is a proper question to be tried as to liability of third party – Civil Procedure Rules, O. 1, r. 14 and r. 18 (U.).*

**Editor's Summary**

The plaintiff sued the defendant for damages for trespass upon his land during which, it was alleged, the defendant dug and removed some earth. The defence was that the respondent had entered upon the land and dug and carried away earth in pursuance of a licence granted to him by one, N. A third party notice was by leave issued against N. by the defendant claiming indemnity and subsequently the case came before the court for directions under O. 1, r. 18 of the Civil Procedure Rules.

**Held –**

- (i) by the terms of O. 1, r. 18, the court had to consider whether there was a proper question to be tried as to the liability of the third party to make contribution or indemnity.
- (ii) no right to indemnity arose as a result of the grant of the licence by N. to the defendant and, accordingly, there was no question to be tried as to liability of N.

Order accordingly. Third party discharged.

**Cases referred to in judgment:**

- (1) *Eastern Shipping Co. v. Quah Beng Kee*, [1924] A.C. 177.
- (2) *Birmingham and District Land Company v. London & North Western Railway Company* (1887), 34 Ch. D. 261.
- (3) *Yafesi Walusimbi v. Attorney-General*, [1959] E.A. 223 (U.).

## **Judgment**

**Slade j:** This is an opposed application for directions under O. 1, r. 18, Civil Procedure Rules, following the issue of a third party notice, leave in that behalf having been obtained by the defendant ex-parte on May 7, 1962.

Before giving such directions, the court must, by the terms of r. 18, “be satisfied that there is a proper question to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part”, and I now turn to consider that matter.

The following facts emerge from the pleadings:

The plaintiff sues the defendant for damages arising out of the trespass of the latter upon his land, during which it is alleged that the defendant dug and removed some 1,360 cubic yards of earth. The defendant, by his written statement of defence filed on April 18, 1962, claims that he entered upon the land and dug and carried away earth in pursuance of a licence in that behalf granted to him by one S. Njuki.

A third party notice was issued by the defendant pursuant to leave under O. 1, r. 14, against Njuki claiming indemnity.

Order 1, r. 14, unlike the present English procedure, is confined to cases in which the defendant claims to be entitled to contribution or indemnity by the third party in respect of the plaintiff's claim. This is clearly not a case of contribution, and the sole question is whether the defendant is entitled to indemnity.

As was said in *Eastern Shipping Co. v. Quah Beng Kee* (1), [1924] A.C. 177 at p. 182:

"A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring v. Ward*; a case of vendor and purchaser), in cases in which the court will 'independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation' of the vendor. These considerations were all dealt with by the Lords Justices in *Birmingham and District Land Co. v. London and North Western Ry. Co.*"

It is clear from a perusal of the licence itself that there is no express covenant for indemnity, but it is argued by Mr. Russell, for the defendant, that there must be implied in that licence a covenant for indemnity or a warranty of title, and that therefore there is a proper question to be tried as to the liability of the third party.

While it may well be that there is an implied warranty of title in the grant of the licence in question (and I am not required to decide that issue), no authority has been cited to me in support of the proposition that there is an implied covenant for indemnity in a licence of the type granted to the defendant, nor have I myself been able to find any such authority. It may well be – to para-phrase what Cotton, L.J., said in *Birmingham and District Land Company v. London and North Western Railway Company* (2) (1887), 34 Ch. D. 261, at p. 271, that the defendant, if he fails in this action, can establish a claim for damages for breach of contract or for misrepresentation as against Njuki, but that is not indemnity.

In the course of his judgment, Cotton, L.J., went on to say this:

"Then, is there any other ground of indemnity? Of course, if A. requests B. to do a thing for him, and B. in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A. to indemnify B. from the consequence of his doing it. In that case there is not an express but an implied contract to indemnify the party for doing what he does at the request of the other. But here I cannot see what request can be said to have been made by the Boulton trustees to the London and North Western Railway Company, nor how any contract to indemnify can be implied unless in every case of a contract for sale a contract to indemnify is to be implied. That, in my opinion, is not the law."



Modifying that passage to the requirements of the instant case, I am unable to see what request can be said to have been made by Njuki to the defendant, nor how any covenant to indemnify can be implied unless in every contract creating a licence, a covenant to indemnify is to be implied.

In the same case, Bowen, L.J., said:

“I think it tolerably clear that the rule, when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract: by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do. I say in nine cases out of ten, for there may possibly be a tenth. Thus there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied. But it is quite clear to my mind that a right to damages, which is all that the defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.”

I have already said that I do not think that there is to be implied in the licence a contract for indemnity. It has not been argued, nor do I think it possible to argue, that there is a statutory indemnity applicable to the licence in question. Nor do I think that there is any other case, to use Bowen, L.J.’s phrase, “of a direct right in equity” between the defendant and the third party to an indemnity.

The defendant in this case, as in the case above cited, has no right to anything against the third party except what arises from the licence. It may be that right is to damages; it may very well be that those damages may exceed those for which the defendant will be liable if the plaintiff succeeds in his action, but on the authorities, a right to damages is not a right to indemnity as such.

Mr. Russell has endeavoured to persuade me that the case of *Yafesi Walusimbi v. Attorney-General* (3), [1959] E.A. 223 (U.), is distinguishable from the present case and that the observations of Lyon, J., in the course of his judgment are obiter. While the facts of that case are, of course, distinguishable from those in this case, it seems to me that the learned judge in that case expressed himself to have reached his decision in accordance with the principle enunciated in the *Birmingham and District Land Company* case (2), a principle which has guided me in reaching my own conclusion.

In my opinion, no right of indemnity arises in the instant case, and I so hold. In some respects it might, and no doubt would, be convenient to bring in Njuki to this case, but under the rule as it stands, I am unable to do so.

For the reasons I have expressed, I make no order on the application, the result being, as I understand the position, that the third party is discharged. The defendant will pay the third party’s costs.

*Order accordingly. Third party discharged.*

For applicant/defendant:

*REG Russell*

*Russell & Co., Kampala*

For respondent/plaintiff:

*Gurdial Singh*

*Singh & Treon, Kampala*

For the third party:

*VN Ponda*

*Shaukat Virji, Daphtary & Co., Kampala*

## **Vithalbhai G Patel v Chanchalben Wife of RK Patel**

[1963] 1 EA 216 (CAN)

|                          |  |
|--------------------------|--|
| <b>Division:</b>         | Court of Appeal at Nairobi                                   |
| <b>Date of judgment:</b> | 23 May 1963  |
| <b>Case Number:</b>      | 1/1963 (P.C.).   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag VP and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica  |

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*[1] Appeal – Jurisdiction – Privy Council – Conditional leave granted to appeal to Privy Council – Conditions not complied with – Application by respondent for rescission of order granting leave – Whether court empowered to rescind such order – Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, s. 11 (K.).*

### **Editor's Summary**

The applicant had obtained conditional leave to appeal to the Privy Council but had failed to comply with the conditions imposed by the court. The respondent then applied to the Court of Appeal for rescission of the order granting the applicant conditional leave to appeal.

### **Held –**

- (i) where the terms of an order for conditional leave to appeal to the Privy Council have not been complied with, the court has power, under s. 11 of the Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, to rescind the order granting conditional leave.
- (ii) the respondent should not be left indefinitely in the position of not knowing whether the

proceedings are at an end or not; accordingly the order granting conditional leave to appeal to the Privy Council should be rescinded.

Order granting conditional leave to appeal to the Privy Council rescinded.

### **No cases referred to in judgment**

### **Judgment**

**Sir Ronald Sinclair P:** read the following ruling of the court: There is no express provision in the Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, specifically covering the circumstances of this case, but we are of opinion that the power given by s. 11 of the Order-in-Council in a case, where the conditions have been complied with, clearly envisages a similar power where the conditions have not been complied with. The court has made such an order in the past though probably no objection was taken. It is clearly undesirable that the respondent should be left indefinitely in the position of not knowing whether the proceedings are at an end.

We accordingly order that the order dated January 17, 1963, granting conditional leave to appeal be and is hereby rescinded. We further order that the applicant do pay the costs of this application and the costs of the application for conditional leave to appeal. There is no necessity to make any order as to the security bond since that automatically vacates on the rescission of the order granting conditional leave to appeal.

*Order granting conditional leave to appeal to the Privy Council rescinded.*

For the applicant:

*DN Khanna*

*Khanna & Co., Nairobi*

For the respondent:

*K Bechgaard, QC and GL Patel*

*GL Patel, Nairobi*

## **Ahmed Hassam Mulji v Shirinbai Jadavji** **[1963] 1 EA 217 (HCT)**

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 27 September 1962                         |
| <b>Case Number:</b>      | 9/1961                                    |
| <b>Before:</b>           | Sir Ralph Windham CJ                      |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Practice – Inherent jurisdiction of court – Ex parte judgment – Application for review – Application*

*incompetent – Application to set aside ex parte decree proper – Application to set aside time-barred – Whether court may invoke its inherent jurisdiction – Indian Civil Procedure Rules, O. IX, r. 13, O. XLVII, r. 1 – Indian Code of Civil Procedure, 1908, s. 151 – Indian Limitation Act, 1908, s. 5, and First Schedule thereto, art. 164.*

### **Editor's Summary**

On January 16, 1962, the High Court gave a declaratory judgment upon *ex parte* proof by the petitioner and his witness, that he had been validly divorced from the respondent in accordance with the Mohamedan law. The respondent did not enter appearance or appear at the hearing. On April 16, 1962, the respondent made an application under O. XLVII, r. 1, of the Indian Civil Procedure Rules, for a review of the judgment, alleging, *inter alia*, that she had not appeared at the hearing of the suit because when she received the summons calling upon her to attend the hearing on the day fixed, her husband, the petitioner, with whom she was still living, dissuaded her from doing so. She further alleged that had she not been prevented by her husband from defending the suit, she would have defended it on more than one ground going to show that she was not validly divorced.

### **Held –**

- (i) the application did not fall within the scope of O. XLVII, r. 1, since there was “no new and important matter or evidence” which had come to light since the *ex parte* judgment, nor was there any “mistake or error apparent” on the face of the record.
- (ii) further, it had been laid down that the words “for any other sufficient reason” in O. XLVII, r. 1, were confined to a reason sufficient on grounds at least analogous to those specified immediately previously and accordingly O. XLVII, r. 1, could not be invoked in the present case.

*Chhajja Ram v. Neki and Others* (1922), 3 Lah. 127, followed.

- (iii) but for art. 164 of the First Schedule to the Indian Limitation Act, 1908, the respondent might have applied under O. IX, r. 13, for the decree to be set aside for “sufficient cause”.
- (iv) the respondent could not invoke the inherent jurisdiction of the court under s. 151 of the Indian Civil Procedure Code because another remedy was available to her and the application must therefore be dismissed.

Application dismissed.

### **Cases referred to in judgment:**

- (1) *Chhajja Ram v. Neki and Others* (1922), 3 Lah. 127.
- (2) *Tanitalia Ltd. v. Mawa Handels Anstalt*, [1957] E.A. 215 (Z.).
- (3) *Ajodhya v. Mussamat Phul Kuer* (1922), A.I.R. Pat. 479.
- (4) *Duni Chand v. Pritam Das* (1925), A.I.R. Lah. 321.
- (5) *K. P. L. S. S. Chettiar v. The Official Receiver* (1935), A.I.R. Rang. 466.

### **Judgment**

**Sir Ralph Windham CJ:** On January 16, 1962, this court gave a declaratory judgment, upon *ex parte* proof by the petitioner

(the present respondent) and his witness, that he had been validly divorced from the respondent (the present applicant) in accordance with Mohamedan law on July 12, 1961. Both parties are Moslems of the Ithna'asheri sect. The judgment was given *ex parte* in default of appearance of the applicant. On April 16, 1962, she filed this application, under O. XLVII, r. 1, of the Indian Civil Procedure Rules, for a review of the judgment, alleging in her supporting affidavits, among other things, that the reason why she failed to appear at the hearing of the suit in which the *ex parte* judgment was given was that, when she received the summons calling upon her to attend the hearing on the day fixed, her husband the respondent, with whom she was still living, dissuaded her from doing anything about it. Her allegations are contained in para. 4 and para. 5 of her affidavit dated June 29, 1962, and they read as follows:

- “(4) I talked to my said husband about the said summons whereupon he told me that if I left his house and went with the said summons to my brother or any of my relatives in Lindi, he would not allow me to re-enter his house.
- (5) My said husband assured me that I should not worry regarding the said summons and that he would fix up this matter. He gave me to understand that he would not pursue this matter.”

The applicant, in her earlier affidavit dated April 11, 1962, further alleges, and this allegation is unchallenged, that the declaratory judgment dated January 16, which was in fact never served on her, came to her knowledge only “in the middle of February, 1962”. Finally, in her application for review she states that, had she not been prevented by her husband from defending the suit, she would have defended it on more than one ground going to show that she was not, or is not, validly divorced from the respondent. Her grounds in this connection include allegations that the witnesses to the alleged divorce were not of the calibre required by law, and that since the divorce the parties have resumed cohabitation. For these several reasons she asks that the suit be re-heard *inter partes*.

The applicant's allegations regarding the invalidity of the divorce are challenged, and those regarding the respondent's having dissuaded her from defending the suit are denied, by the respondent in a counter-affidavit. But I am not at present concerned with, nor from the affidavits themselves am I able to make any finding of fact regarding, the truth of the allegations in the applicant's affidavits. I am only concerned, for the purpose of this application, with whether they may be true and, if they may, then what remedy if any is open to her to enable her to obtain the redress that she seeks.

I am satisfied that the applicant's allegations regarding her husband's dissuasion may be true, there being nothing inherently improbable in them. And although she does not go so far as actually to allege that he obtained the *ex parte* declaratory judgment through fraud, her allegations would, I consider, be of such a nature as at least to establish “sufficient cause” for setting it aside under O. IX, r. 13, if an application had been made under that rule. Her possible alternative remedies in this court would be to apply for a review under O. XLVII, r. 1, which she has in fact done; or to invoke the inherent jurisdiction of this court, preserved by s. 151 of the Indian Civil Procedure Code, 1908.

In the light of the decided authorities I do not think that the grounds upon which the present application is based fall within the scope of O. XLVII, r. 1. There is no question here of any “new and important matter or evidence” having come to light since the *ex parte* judgment was given on January 16, 1962, or of any “mistake or error apparent on the face of the record”. And with regard to the third ground upon which a review may be granted under the rule, namely “for any other sufficient reason”, it has been laid down by the Privy

Council in *Chhajja Ram v. Neki and Others* (1) (1922), 3 Lah. 127, that these words must be confined to “a reason sufficient on grounds at least analogous to those specified immediately previously”. The test of analogy laid down in that decision has been applied in the courts of India in a number of cases, not always without reluctance; and also, I would add, by the High Court of Zanzibar in *Tanitalia Ltd. v. Mawa Handels Anstalt* (2), [1957] E.A. 215 (Z.), where at p. 218 I observed that

“Since that decision the courts have not always found it easy to apply the test of analogy to cases coming before them . . . But the test has always been, and must be, applied”.

Applying it to the present case, I am unable to say that there is, in the grounds advanced in support of this application for review, anything analogous to the “discovery of new and important matter or evidence” or to any mistake or error on the face of the record. That being so, I must hold that O. XLVII, r. 1, cannot be resorted to in the present case.

Can the applicant, then, invoke such inherent jurisdiction as is vested in this court to “make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”? Such jurisdiction is preserved by s. 151 of the Indian Civil Procedure Code. Before deciding this point it is necessary to see whether any other remedy was open to the applicant. We have seen that O. XLVII, r. 1, was not available to her. But could she not have applied under O. IX, r. 13, to have the *ex parte* decree set aside for “sufficient cause”? I have already said that I think the grounds adduced in support of the present application would have afforded “sufficient cause” for that purpose. Now, with regard to the question of limitation, an application under O. IX, r. 13, is covered by art. 164 of the First Schedule to the Indian Limitation Act, 1908. Under that article the prescribed period of limitation is thirty days from “the date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree”. In the present case, as we have seen, the date of the decree was January 16, 1962. It was not served on the applicant; but she has stated in her earlier affidavit that she was “informed” about it “in the middle of February, 1962”. Thus, when she filed her present application on April 16, 1962, some two months had elapsed since the decree had come to her knowledge. No reason has been advanced by her or on her behalf why she failed to file an application under O. IX, r. 13, within the prescribed period, that is to say before the middle of March, 1962, such as might have constituted “sufficient cause”, for the purpose of s. 5 of the Indian Limitation Act, 1908, for filing an application under r. 13 after the period of limitation had expired, assuming that any such application had been filed at all.

That being so, the applicant cannot invoke this court’s inherent jurisdiction, as preserved by s. 151 of the Indian Civil Procedure Code, since another remedy was available to her: vide Mulla’s Civil Procedure Code (12th Edn.), Vol. 1, at p. 660. In *Ajodhya v. Mussamat Phul Kuer* (3) (1922), A.I.R. Pat. 479, a case where, similarly, no application under O. IX, r. 13, had been filed in time, it was held that –

“Moreover a definite period of limitation has been prescribed by art. 164 of Schedule I to the Limitation Act for an application to set aside an *ex parte* decree and the court would not be entitled, by purporting to act under s. 151, in effect to extend that period.”

And in *Duni Chand v. Pritam Das* (4) (1925), A.I.R. Lah. 321, it was similarly laid down:

“It has been held repeatedly that s. 151 of the Code of Civil Procedure cannot be invoked to help a party who had a remedy provided by law and

failed to take advantage of that remedy within the period of limitation allowed.”

And see a general discussion of the Indian case law on the subject in *K. P. L. S. S. Chettiar v. The Official Receiver* (5) (1935), A.I.R. Rang. 466.

For these reasons I hold, not without some reluctance since a question of status is involved, that in the light of the relevant authorities I am precluded from allowing this application, whether under O. XLVII, r. 1, under which it was brought, or in the exercise of any inherent jurisdiction. The application must be dismissed. There will be no order for costs.

*Application dismissed.*

For the applicant/respondent:

*RS Thornton*

*Fraser Murray, Thornton & Co., Dar-es-Salaam*

For the respondent/petitioner:

*MN Rattansey*

*Mahmud N Rattansey & Co., Dar-es-Salaam*

**Deziderio Kiddyombo v Kikutebude Growers' Co-operative Society Ltd and  
another**

[1963] 1 EA 220 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 29 April 1963                   |
| <b>Case Number:</b>      | 43/960                          |
| <b>Before:</b>           | Slade J                         |
| <b>Sourced by:</b>       | LawAfrica                       |

(District Registry, Masaka.)

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[1] *Jurisdiction – African parties – Company – Action in High Court by an African against company – All members of company Africans – Whether action should be transferred to Principal Court – Interpretation and General Clauses Ordinance (Cap. 1), s. 3 (1) and (8) (U.) – Buganda Courts Ordinance (Cap. 77), s. 2, s. 6 (4) and s. 7 (U.).*

**Editor's Summary**

At the hearing of an action in the High Court by an African plaintiff against a limited company and another African, in which it was conceded that all the members of the company were Africans, a question

of jurisdiction considered was whether, under s. 7 of the Buganda Courts Ordinance, the suit should be transferred to the Principal Court.

**Held –**

- (i) the special definition of the term “African” occurring in the Buganda Courts Ordinance excludes the general definition of that term occurring in the Interpretation and General Clauses Ordinance which by s. 3 (8) thereof includes corporate bodies all of whose members are Africans.
- (ii) the provisions of s. 7 of the Buganda Courts Ordinance did not apply to an action against a company and the High Court had jurisdiction to hear and determine the issues.

*Mayambala v. Buganda Government*, [1962] E.A. 283 (U.), considered.

Order accordingly.

**Cases referred to in judgment:**

- (1) *Mengo Builders and Contractors Ltd. v. Kasibante*, [1958] E.A. 591 (U.).
- (2) *Isaka Mayambala v. Buganda Government*, [1962] E.A. 283 (U.).
- (3) *Reuben Musanje v. Tomasi Yamulemye*, [1961] E.A. 716 (C.A.).



## Judgment

**Slade J:** At the commencement of this case, the question of the jurisdiction of this court was raised. It is conceded, for the purposes of argument on this question, that the first defendant is an incorporated company, all the members of which are Africans, and it is not in dispute that both the plaintiff and the second defendant are Africans.

The question, therefore, is whether, under the provisions of s. 7, Buganda Courts Ordinance (Cap. 77), the suit should be transferred to a court as defined by that Ordinance.

By virtue of the provisions of the Buganda Courts Ordinance, all Buganda courts may exercise jurisdiction over all causes and matters where, in proceedings of a civil nature, all parties are Africans, or where, in proceedings of a criminal nature, the accused is an African.

By s. 2 of the Ordinance, the word “African” is defined in the following terms:

“ ‘African’ means any person whose tribe is a tribe of the Protectorate or of the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika, Nyasaland, the Sudan, the Belgian Congo or the Mandated Territory of Ruanda-Urundi, and includes a Swahili.”

The Ordinance contains no reference to jurisdiction in respect of companies or other incorporated bodies, save that in s. 6 (4) jurisdiction is conferred in respect of proceedings in which the Crown or the Kabaka’s Government are parties.

The position is somewhat complicated by the provisions of s. 3 (1), Interpretation and General Clauses Ordinance (Cap. 1), which defines the term “African” for that and every other Ordinance “unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided”. By that definition, “African” is expressed to mean any person who is a member of or one of whose parents is or was a member of an indigenous African tribe or community, but the term is expressed not to include an Egyptian, an Abyssinian (Ambara, Tigre or Shoa), a Somali, a Seychellois, a Baluchi born in Africa, a Malagasy or a Comoro Islander. It is therefore clear that the definition of “African” in the Interpretation Ordinance is very much wider than that occurring in the Buganda Courts Ordinance.

Section 3 (8), Interpretation and General Clauses Ordinance extends the definition to include not only individuals but corporate and unincorporate bodies, and is in the following terms:

“3.(8) Save and except in regard to the provisions of the Income Tax Ordinance, and any Ordinance amending or replacing the same, any company, association, partnership or body of persons corporate or unincorporate all of whose members are Africans within the meaning of sub-s. (1) of this section shall be deemed to be an African so long as all the members thereof are Africans as aforesaid.”

Is, then, the term “African” occurring in the Buganda Courts Ordinance to be interpreted in accordance with the definition specifically provided by s. 2 of that Ordinance, or is it to be interpreted by reference to the Interpretation and General Clauses Ordinance?

The position, as I see it, is quite clear and I am in no doubt that the special definition occurring in the Buganda Courts Ordinance excludes the general definition occurring in the Interpretation and General Clauses Ordinance.

I am fortified in my opinion by the judgment of McKisack, C.J., in the case of *Mengo Builders and*

*Contractor Limited v. Kasibante* (1), [1958] E.A. 591 (U.). In the course of that judgment, the learned Chief Justice observed as follows:

“It will be seen that the definition in the former Ordinance is much wider than the one in the Buganda Courts Ordinance and would include, for example, members of West African or South African tribes or communities, who are not included in the term as defined in the Buganda Courts Ordinance. When the Interpretation and General Clauses Ordinance says that a company of which all the members are Africans within the meaning of that term as defined in that Ordinance is to ‘be deemed to be an African’, it means that the company is to be deemed to be an African as defined in that Ordinance. It does not mean that it is to be deemed an African as differently defined in any other Ordinance. Consequently it cannot mean that the company is to be deemed an African as defined in the Buganda Courts Ordinance. And the Buganda Courts Ordinance gives jurisdiction only over those Africans who are defined in that Ordinance. If the ruling of the Principal Court were correct, it would mean that that court would have jurisdiction over a company all of whose members were West Africans, whereas it has no jurisdiction over an individual West African. Such a result would be quite illogical.”

It has been suggested that Sheridan, J., in *Isaka Mayambala v. Buganda Government* (2), [1962] E.A. 283 (U.), came to a different conclusion. In that case the learned judge, for reasons he therein expressed, ruled that the Principal Court was the appropriate tribunal to determine the issues raised in that suit. So far as his order is based on an interpretation of the Buganda Courts Ordinance and not on the judgment of the East African Court of Appeal in the case of *Reuben Musanje v. Tomasi Yamulemye* (3), [1961] E.A. 716 (C.A.), it does not appear that the attention of my learned brother was directed to the provisions of s. 6 (4), Buganda Courts Ordinance. Had it been so directed, I have no doubt that he would have reached the same conclusion that he reached on other grounds.

For the reasons I have stated, the provisions of s. 7, Buganda Courts Ordinance, do not apply to this suit and the issues will be heard and determined by this court.

*Order accordingly.*

For the plaintiff:

*SH Dalal*

*Haque, Dalal & Singh, Kampala*

For the defendants:

*JWR Kazzora*

*JWR Kazzora, Kampala*

**Abdulla Abdul Majid Al-Asnag and others v R**  
[1963] 1 EA 223 (CAN)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Nairobi                                    |
| <b>Date of judgment:</b> | 3 June 1963   |
| <b>Case Number:</b>      | 27/1963   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |

**Appeal from:** H.M. Supreme Court of Aden – Le Gallais, C.J

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*[1] Criminal law – Sedition – Conspiracy to publish a seditious publication – No extrinsic evidence of seditious intention – Mens rea – Whether mens rea an essential ingredient of the offence – Penal Code, s. 124 A. (A.) – Penal Code, s. 53 (1) (c) (U.).*

### **Editor’s Summary**

The appellants were convicted by a magistrate of conspiring to do an act with a seditious intention, that is to say, to publish a seditious publication contrary to s. 124A of the Penal Code. The magistrate did not specifically find that the appellants had a seditious intention in agreeing to publish the pamphlet nor as to the appellants’ knowledge of the contents of the pamphlet, but he found that all three appellants had full knowledge of the nature of the pamphlet. Their appeal to the Supreme Court was dismissed. On a second appeal it was contended that an essential ingredient of the offence was that they should have a seditious intention and that there was no evidence that they had conspired to publish the pamphlet with such intent. It was further contended that the words “with a seditious intention” in para. (a) of s. 124A (1) indicated that a seditious intention on the part of the conspirators is necessary to constitute the offence.

### **Held –**

- (i) the words “with a seditious intention” in para. (a) of s. 124A (1) of the Penal Code relate to the intention of the person charged; therefore, to establish the offence charged it was necessary to prove that the appellants had a seditious intention.
- (ii) before it can be presumed that a person intends the natural and probable consequences of his acts under sub-s. (4) of s. 124A (1), the person against whom the presumption is sought to be made must have knowledge of the circumstances and the nature of his acts.
- (iii) the onus was on the Crown to establish a seditious intention on the part of the appellants and also to establish that the appellants had knowledge of the contents of the pamphlet; in the absence of any finding as to the appellants’ knowledge of the contents of the pamphlet it was not established that the appellants had a seditious intention in publishing the pamphlet.

Appeal allowed. Conviction quashed and sentence set aside.

### **Cases referred to in judgment:**

- (1) *R. v. Martin G. Luima and Others* (1949), 16 E.A.C.A. 128.
- (2) *Girdharilal Vidyarthi and Another v. R.*, E.A.C.A. Criminal Appeals Nos. 72 and 73 of 1946 (unreported).
- (3) *Wallace-Johnson v. R.*, [1940] A.C. 231; [1940] 1 All E.R. 241.
- (4) *Lawrence Oguda v. R.*, [1960] E.A. 745 (C.A.).
- (5) *Director of Public Prosecutions v. Smith*, [1960] 3 All E.R. 161.

### **Judgment**

**Sir Ronald Sinclair P:** The following judgment was read by direction of the Court: This is a second appeal by the appellants

from their conviction by the Chief Magistrate, Crater, on the following charge: –

“Statement of offence (name of offence and section of law)

“Sedition contrary to s. 124A of the Penal Code

“Particulars of offence (date, place and description of offence):

Abdulla Abdulmagid Al-Asnag, Idris Ahmed Hasan Hanbala, Abdulla Ali Ubaid Al Wahti, you are charged that between September 24, 1962 and October 31, 1962, in the Colony of Aden, you together with other persons unknown did conspire together to do an act with a seditious intention that is to say to publish a seditious publication in Arabic entitled ‘An Immortal Day’ (a translation of which is appended as a schedule hereto) and thereby committed an offence punishable under s. 124A of the Penal Code.”

It was not disputed before this court that a pamphlet entitled “An Immortal Day” was published and that it was a seditious publication. The first point taken by Mr. O’Donovan for the appellants was that an essential ingredient of the offence with which the appellants were charged is that they should have a seditious intention and that there was no evidence that they conspired to publish the pamphlet in question with such an intention.

The answer to the question whether it was necessary to prove that the appellants had a seditious intention depends upon the construction to be placed on para. (a) of sub-s. (1) of s. 124A of the Penal Code. Sub-section (1) of that section reads:

“124A (1) Any person who –

- (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
- (b) utters any seditious words;
- (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
- (d) brings into the Colony, or into the territorial waters of the Colony, any seditious publication, unless he has no reason to believe that it is seditious;

shall be punished for a first offence with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand five hundred shillings, or with both such imprisonment and fine, and for a subsequent offence with imprisonment for a term which may extend to three years.”

A “seditious intention” is defined in sub-s. (3). In sub-s. (5) a seditious publication is defined as meaning “a publication having a seditious intention” and “seditious words” are defined as meaning “words having a seditious intention”. Sub-section (4) provides as follows:

- “(4) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.”

Mr. O’Donovan contended that the words “with a seditious intention” in para. (a) indicate that a seditious intention on the part of the conspirators is necessary to constitute an offence under that paragraph. He conceded, on the authority of *R. v. Martin G. Luima and Others* (1) (1949), 16 E.A.C.A. 128,

that no mens rea on the part of the publisher of a seditious document is necessary to constitute an offence under para. (c), but he pointed out that the words “with a seditious intention” do not appear in para. (c); indeed they are not used in any of the other paragraphs. He submitted that while it is reasonable that there should be absolute liability on the part of the publisher of a seditious document since the mischief has been done, it would be unreasonable if persons were criminally liable for merely agreeing to publish a seditious document unless they had a seditious intention. If a seditious intention was not necessary then, for instance, an editor of a newspaper who agreed with a contributor to publish an article which he had not seen but which was in fact seditious, would be guilty of an offence although as soon as he read the article he refused to publish it. Mr. O’Donovan argued that, in the circumstances of the present case, in order to prove a seditious intention on the part of the appellants, it was necessary to establish that the appellants had knowledge of the seditious contents of the pamphlet: that the onus was upon the Crown to establish such knowledge: that while there might be some evidence that the second appellant had knowledge of the contents of the pamphlet, there was no evidence that either the first or the third appellant had such knowledge and that the charge of conspiracy was not established if only one of the alleged conspirators was proved to have a seditious intention.

For the Crown it was submitted that a mere agreement between two or more persons to publish a document which is in fact a seditious publication is an offence under para. (a) without any seditious intention on the part of the conspirators. As we have understood the argument in support of that submission it is as follows. The words “with a seditious intention” in para. (a) relate to the word “act” and not to the words “any person”. The same intention is imported into para. (b) and (c) by virtue of the definition of “seditious words” and “seditious publication” and the three paragraphs should be similarly construed in so far as intention is concerned. In *Luima’s* case (1), it was held that if a publication is expressive of a seditious intention no extrinsic evidence is necessary to prove intention and that no mens rea on the part of the publisher is required on a charge of publishing a seditious publication. On a charge under para. (a), therefore, if the act in question manifests a seditious intention no other evidence of intention is required and it is not necessary to prove a seditious intention on the part of the conspirators. In the present case the act of publishing a seditious document manifested a seditious intention and no other evidence of intention was necessary.

The question is one of some difficulty which is not made any easier by the somewhat inappropriate wording of the definitions of “seditious words” and “seditious publication”. A speaker can have a seditious intention in uttering certain words and the publisher of a document can have a seditious intention in publishing it, but we doubt whether words or a publication can properly be described as having a seditious intention. In *Luima’s* case (1), this court appears to have construed an identical definition of seditious publication in the Uganda Penal Code as meaning “a publication expressive of a seditious intention”. That was an appeal from convictions on charges of publishing a seditious publication contrary to s. 53 (1) (c) of the Uganda Penal Code which is in the same terms as s. 124A (1) (c) of the Aden Penal Code. Paragraph (a) of sub-s. (1) of s. 53 is also in the same terms as para. (a) of the Aden section, but para. (b) reads “utters any words with a seditious intention”. The court followed its decision in the earlier unreported case of *Girdharilal Vidyarthi and Vanshi Dhar v. R.* (2) E.A.C.A. Criminal Appeals Nos. 72 and 73 of 1946 (unreported). The latter case was an appeal from the Supreme Court of Kenya, but at that time the law relating to sedition was the same in Kenya as in Uganda. In that case the court adopted and applied the following passage from the judgment of the Privy Council in *Wallace-Johnson v. R.* (3), [1940] A.C. 231:

“The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist, must also fail and fail for the same reason. If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The legislature of the Colony might have defined seditious words’ by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so.”

As to whether mens rea is a necessary element of the offence this court said:

“As regards mens rea it was urged for the appellant Vidyarthi that there being on his part no mens rea in regard to the article in Gujarati, a language which he did not understand, a necessary element of the offence alleged in regard to the Gujarati article was missing and he should be acquitted. Generally speaking of course mens rea is a necessary element in a crime, but, as it was put in the judgment of Cave, J., in the case of *Chisholm v. Doultton*, 22 Q.B.D. at p. 741, quoted to us by appellant’s counsel, it is in the power of the legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be punished for an offence although there was no blameworthy condition of mind about him. Whether the legislature does or does not so enact is a matter of policy which is no concern of the courts. Here the legislature of Kenya, rightly or wrongly, has so framed the sections of the Penal Code dealing with seditious publications as to exclude the necessity of mens rea as an element in the offence of publication. ‘Any person who . . . publishes . . . any seditious publication . . . shall be guilty of an offence.’ (Section 58 (1) (c) of the Penal Code.) The sub-section does not say ‘any person who knowingly publishes’ and differing from sub-s. (a) and (b) does not contain the words ‘with a seditious intention’.

“The plain meaning of that is that the Kenya legislature has decided as a matter of policy to punish anyone who publishes any seditious publication thereby putting it upon publishers to satisfy themselves that anything published by them is not a seditious publication.

“The reasonableness of that policy is not for this court to consider but it is perhaps not superfluous to point out that the mischief is done whenever the seditious publication is published, whether the publisher took the trouble to know what he was publishing or not. It is the fact of publication and not the attitude of mind of the publisher which is the evil at which the Kenya law as to seditious publication is aimed. Only the publishers have the opportunity by careful examination before publication of preventing the fact of publication of seditious matter. They neglect that opportunity at their own peril as apparently the appellant Vidyarthi did in the present case.”

The implication from that passage is that the court considered that the words “with a seditious intention” in para. (a) and para. (b) of the Kenya section relate to the intention of the person charged. In the later case of *Lawrence Oguda v. R.* (4), [1960] E.A. 745 (C.A.), the decision was clearly based on the assumption that the words “with a seditious intention” in para. (b) of the Kenya section relate to the intention of the person charged.

In our view a similar construction should be placed on those words in para. (a). Had the intention of the legislature been that which is contended by the Crown we think that different wording would have been used. For instance, reference could have been made to a “seditious act” and that expression given a similar definition to “seditious words” and “seditious publication”. Furthermore, it



was conceded by the Crown, and, indeed, we think it is clear, that “act” in para. (a) is not limited to the acts defined in paras. (b), (c) and (d). Nor do we think there is any justification for limiting the word to acts which themselves demonstrate or manifest a seditious intention. There may well be acts which, though they do not manifest a seditious intention, nevertheless are done with a seditious intention. In our view such an act would constitute an offence under para. (a). If that is so, it follows that the words “with a seditious intention” relate to the intention of the person charged.

We think also that some guidance is to be obtained from the law of sedition in England. Although that law differs in some respects from the statutory provisions in the Penal Code, it is the offence of sedition in England to do any act with a seditious intention just as it is an offence under para. (a): see Halsbury’s Laws of England (3rd Edn.), para. 1054, p. 569. It is quite clear that in England the seditious intention relates to the person charged, though the nature of the act may constitute irresistible evidence of that intention. Paragraph 1055 of the same volume of Halsbury’s Laws of England, reads:

“A seditious intention is of the essence of the offence, and if the acts done or words used were not done or used with such an intention the offence of sedition has not been committed, however defamatory the words may be. The character of the words may form irresistible evidence of the nature of the intention.”

We are, therefore, of the opinion that in order to establish the offence charged it was necessary to prove that the appellants had a seditious intention.

We turn now to the question whether a seditious intention on the part of the appellants was established. This being a second appeal we are, of course, concerned only with questions of law. The trial magistrate did not deal specifically with the question whether the appellants had a seditious intention in agreeing to publish the pamphlet and made no express finding thereon, but he concluded his judgment as follows:

“I find that all three accused had full knowledge of the nature of the pamphlet that was to be published and I also find on the evidence that acting in concert they did conspire to publish this seditious pamphlet as alleged in the charge.”

On appeal to the Supreme Court the learned Chief Justice dealt with the question of intention as follows:

“Turning now to a conspiracy or agreement to publish such a document, in order to ascertain the intention underlying the agreement, one must look to the natural consequences of that agreement. What could these be other than the laying before the public of something containing a seditious intent?”

“Applying the provisions of s. 124A (4) *supra*, a person who agrees to such publication is deemed to intend those consequences without any extrinsic evidence of his intentions at the time of the agreement.

“It follows therefore that if the publication is itself seditious, the intention behind the agreement leading to its publication is also to be deemed seditious without extrinsic proof of *mens rea*.

“The case of *R. v. Sorsky and Others*, [1944] 2 All E.R. 333, which was relied on by the Crown, is I think distinguishable from the instant case to the extent that the offence which it was conspired to commit was a statutory one, carrying absolute liability, it being held that conspiring to commit that offence required no proof of *mens rea*. Although the Aden law

relating to the publication of seditious documents is also statutory, nevertheless the state of the mind is by no means irrelevant, but rather something deemed to exist from the nature of the document itself. The distinction is thus an academic one only, and for all practical purposes, once a document is shown to be seditious, no additional evidence as to the intention of an agreement to publish it is required by law.

“The learned chief magistrate did not deal specifically with the element of seditious intention attached to the conspiracy itself as opposed to the seditious nature of the pamphlet in question, but in view of the foregoing, I do not think that he misdirected himself.”

It is evident that the learned Chief Justice took the view that by reason of the provisions of sub-s. (4) of s. 124A, the appellants must be deemed to have had a seditious intention since the pamphlet which they agreed to publish was in fact seditious, even though they may have had no knowledge of its seditious nature.

Does sub-s. (4) apply to a conspiracy to do an act? The sub-section refers to an act done, words spoken and a document published. Here the essence of the charge is an agreement and the offence (provided seditious intent is proved) is complete without the necessity of any resultant act, words, or publication. It might be argued that, although an agreement is in one sense an act, the sub-section contemplates something in the nature of an overt act, itself the subject of the charge. We do not, however, find it necessary to decide the point, but base our decision on the assumption that the sub-section can apply to a conspiracy to do an act.

In our view, before any presumption can be made under the sub-section, the person against whom the presumption is sought to be made must have knowledge of the circumstances and the nature of his acts. In his speech in *Director of Public Prosecutions v. Smith* (5), [1960] 3 All E.R. 161, the Lord Chancellor, Viscount Kilmuir, referring to the presumption that a man intends the natural and probable consequences of his acts, said this at p. 170:

“Provided that the presumption is applied, once the accused’s knowledge of the circumstances and the nature of his acts have been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility.”

We think the principle, there laid down, that the accused person’s knowledge of the circumstances and the nature of his acts must be ascertained before the presumption that he intends the natural and probable consequences of his acts can be applied, is equally applicable to the statutory presumption under the sub-section. It is the foundation of any such presumption. If, therefore, the appellants had no knowledge of the seditious contents of the pamphlet when they agreed to publish it, they did not have knowledge of the nature of their acts and, without such knowledge, no presumption of a seditious intent on their part could arise, whether under the sub-section or otherwise, merely from the fact that the pamphlet itself was seditious. The onus being upon the Crown to establish a seditious intention on the part of the appellants, we think it was clearly upon the Crown to establish the appellants’ knowledge of the contents of the pamphlet.

We return now to the judgment of the trial magistrate. He did not make any express finding as to the appellants’ knowledge of the contents of the pamphlet, but, as we have said, he found that the appellants had full knowledge of its nature. That finding is, in the circumstances, equivocal. The pamphlet related to certain events which occurred, or were alleged to have occurred, on September 24, 1962, when certain Adenis, in opposition to the proposed federation of Aden with the Arab Amirates of the South, rioted whilst the Legislative Council

debated the proposed merger. Taken alone, the finding could perhaps mean that the appellants had full knowledge of the seditious nature of the pamphlet through a knowledge of its contents or, on the other hand, it could mean merely that the appellants had full knowledge that the pamphlet was on the subject of the rioting which occurred on September 24, without a knowledge of the seditious nature of its contents.

In our opinion the evidence clearly could support a finding that the three appellants knew that a pamphlet on the subject of the events of September 24, was to be published. As regards the second appellant there was also evidence which could support a finding that he had knowledge of the contents of the pamphlet. The evidence as to the first appellant's knowledge of the contents was less strong though, from the positions which he held in the Aden Trade Union Congress, which published the pamphlet, and the People's Socialist Party, the inference might be drawn that he had such knowledge. But there was no evidence that the third appellant had any knowledge of the contents of the pamphlet or of its seditious nature. He was employed by the Aden Trade Union Congress merely as a paid distributor of their newspapers and books. No inference that he had knowledge of the contents of the pamphlet could be drawn from the fact that he assisted in stapling and later in distributing it. The trial magistrate must have been aware that no such inference could be drawn in the case of the third appellant. In those circumstances it would be unsafe to conclude that when he said the appellants had full knowledge of the nature of the pamphlet which was published, he meant any more than that they had full knowledge that a pamphlet was to be published on the subject of the events of September 24. In the absence of any finding as to the appellants' knowledge of the contents of the pamphlet, we are unable to say that a seditious intent on the part of the appellants was established. This court on a second appeal in a criminal matter cannot itself make any findings of fact. It may be that the first and second appellants could have been convicted of publishing and the third appellant of distributing a seditious publication, but that was not the charge.

For those reasons we are of opinion that the appeals must be allowed. The conviction and sentence of each appellant are accordingly quashed. We were informed that the appellants have already served their sentences of imprisonment and been discharged from prison.

*Appeal allowed. Conviction quashed and sentence set aside.*

For the appellants:

*Bryan O'Donovan, QC and MA Murgian*

*MA Murgian, Nairobi*

For the respondent:

*MT Maloney (Senior Crown Counsel, Aden)*

*The Attorney-General, Aden*

**The Administrator-General of Zanzibar v Khalfan Bin Ali Bin Mohamed  
El-Battashy and others**  
[1963] 1 EA 230 (HCZ)

**Division:**

High Court of Zanzibar at Zanzibar

**Date of judgment:** 7 September 1962  
**Case Number:** 35/1962 (O.S.)  
**Before:** Horsfall Ag CJ  
**Sourced by:** LawAfrica

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*[1] Intestacy – Commorientes – Death of father and son in common calamity – Father wounded first – Son struck immediately afterwards – No evidence as to moment of death.*

### **Editor's Summary**

The plaintiff took out an originating summons to determine whether a son had survived his father. It was common ground that both died in a common calamity when their house was attacked by a mob. The father was regarded as an old man and blind, while his son was fourteen years old. A witness gave evidence that the father left the house first, was slashed with sticks and bush knives and fell to the ground bleeding. He was followed by his son who was struck on his head but, although giddy from the blow, walked back into the house. That was the last the witness saw of the son but she said she considered the father was dead when she left "... because he was being assaulted there". There was no evidence when Hamoud died, though there was no dispute that he did so as a result of injuries received from the mob. Counsel for the defendants submitted that he had discharged the onus by proving that the son was alive when the father was mortally wounded.

**Held** – the massacre was a common calamity in which the father and son did not die simultaneously; but the court could not draw any inference that an elderly blind man would struggle against death longer than a boy of fourteen years or vice versa and it was impossible to say which survived the other.

Order accordingly.

### **Case referred to:**

(1) *K. S. Agha Mir Ahmed Shah and Another v. Mir Mudassir Shah and Others* (1944), A.I.R. P.C. 100.

### **Judgment**

**Horsfall Ag CJ:** The agreed issue on this originating summons is: Did the son, Hamoud bin Soud, survive his father, Soud bin Ali? It is agreed that the burden of proof is on defendants 2, 3 and 4. I consider that this burden will be discharged if counsel establishes on balance the reasonable probabilities for what he contends.

The facts are that Soud bin Ali was blind. There is no evidence of his age beyond that he is described by the vague term "old". I find that his son Hamoud was aged fourteen years. It is proved that about 1 p.m. on a Saturday afternoon early in June, 1961, during the riots the house of Soud was attacked by a mob. Soud, Hamoud, the witness Munira binti Khamis and her husband collected in the corridor of Soud's house. The husband made a run for it and escaped out of the house only to be eventually killed. When the murderous mob broke in by the windows the three remaining, in the following order, tried to escape from the house by the rear door. Soud went first guided by the woman Munira behind him,

followed by the son Hamoud. When the party in this order opened

the rear door of the house and reached the fenced compound they were greeted by more of the murderous mob. They could not re-enter the house because of the mob inside nor escape because of the mob which was outside the door. Soud was slashed with sticks and bush knives around the chest and shoulders and fell to the ground bleeding. Hamoud was hit on the head. The woman, Munira, was assaulted and when she said to Hamoud: "Let us go," he replied: "I am not going to leave my father." Munira managed to flee away and has lived to tell the tale. She says that Hamoud, being giddy from being hit, walked back into the house. That was the last she saw of Hamoud. Munira considered that Soud was dead when she left. "I knew he was dead because he was being assaulted there." She was referring to the fury of the assault and she is asking me to infer that it finished off the old man then and there. There is no dispute that Hamoud died as the result of injuries received from the mob. There is no evidence when he died.

2. There is no dispute as to the law. I quote from the head-note in the case of *K. S. Agha Mir Ahmed Shah and Another v. Mir Mudassir Shah and Others* (1) (1944), A.I.R. P.C. 100:

"When two individuals perish in a common calamity and the question arises as to who died first, in the absence of evidence on the point, there is no presumption that the younger survived the elder. Such a question is always from first to last a pure question of fact of the onus probandi lying on the party who asserts the affirmative."

I hold that this massacre was a common calamity and that the father and son did not die simultaneously in it. Counsel for defendants 2, 3 and 4 has submitted that he has discharged the onus by proving that the son was alive when the father was mortally wounded. I agree that the father was probably mortally wounded when he fell but that is not enough. Can I properly infer that the father died immediately after he fell? There is no evidence of the nature of the injuries inflicted on the father. I cannot refuse the possibility that the father's wounds did not immediately prove fatal. He may have breathed for a little time. It is possible that the son might have been immediately killed directly he re-entered the house. I don't think that I can draw any inference that an elderly blind man would struggle against death longer than a boy of fourteen years of age or vice versa. I find it impossible to say which survived the other. Neither inherits from the other. Accordingly Soud's brother, the first defendant, is entitled to five twenty-fourths of the estate. Costs of both parties to come out of the estate.

*Order accordingly.*

For the plaintiff:

*KC Kotecha*(Crown Counsel, Zanzibar).

*The Administrator-General, Zanzibar*

For the first defendant:

*PS Talati*

*Wiggins & Stephens, Zanzibar*

For the second, third and fourth defendants:

*AMS Parkar*

*Parkar & Co, Zanzibar*

**Jaffer Gulamhussein and another v The Republic**

## [1963] 1 EA 232 (HCT)

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 3 April 1963  
**Case Number:** 141/1963  
**Before:** Law Ag CJ and Weston and Spry JJ  
**Sourced by:** LawAfrica

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*[1] Criminal law – Evidence – Theft – Acquittal by magistrate on ground that witnesses and accomplices unreliable – Appeal by way of case stated – Finding by appellate court that witnesses not accomplices – Direction to magistrate to convict – Whether conviction can be supported in view of finding that witnesses unreliable.*

*[2] Criminal law – Practice – Direction by appellate court to subordinate court – Acquittal by magistrate on ground that witnesses and accomplices unreliable – Appeal by way of case stated – Finding by appellate court that witnesses not accomplices – Direction to magistrate to convict – When such direction proper.*

### Editor's Summary

The appellants who were charged on eleven counts of stealing maize contra s. 265 of the Penal Code were acquitted by the district court of Arusha. On appeal to the High Court by way of case stated, the principal issue was whether the magistrate had misdirected himself in holding that certain witnesses were accomplices. The magistrate in his judgment had said that certain prosecution witnesses were accomplices and that he found their evidence unreliable “even were there the necessary corroboration”. The High Court held that the magistrate had erred in law in finding that one of the witnesses (No. 8) was an accomplice and said “but for his finding that the case against the two accused rests on uncorroborated accomplice evidence, the . . . magistrate would have convicted the two accused”, and ordered that the proceedings be returned to the district court with a direction to convict. The two appellants, having been convicted by the magistrate, appealed to the High Court against conviction and sentence.

### Held –

- (i) in view of his remark that all the witnesses were unreliable, the court was not sure whether the magistrate would have convicted, had he found that witness No. 8 was not an accomplice.
- (ii) a lower court should not be directed to convict unless its findings as embodied in its judgment are such that a conviction is inevitable.

Appeal allowed. Convictions and sentences set aside.

### Cases referred to in judgment:

- (1) *Ismail (Jaffer Gulamhussein) v. Republic*, [1963] E.A. 55 (C.A.).
- (2) *Johnston v. R.* (1951), 18 E.A.C.A. 278.

(3) *Simpson v. District Council of Nakuru* (1939), 6 E.A.C.A. 83.

(4) *R. v. Ibrahim H. Lakhani* (1943), 10 E.A.C.A. 107.

### **Judgment**

**Law Ag CJ:** read the following judgment of the court:

The two appellants in this consolidated appeal were charged in the district court of Arusha on eleven counts of stealing maize, contrary to s. 265 of the



Penal Code, the total value of the stolen property amounting to over Shs. 16,000/-. Both men were acquitted.

The prosecution appealed to the High Court (Biron, J.) by way of case stated, the principal questions being whether the learned magistrate had misdirected himself in holding that certain witnesses were accomplices. On November 1, 1962, Biron, J., gave judgment on the case stated. He found that the learned magistrate had erred in law in finding that one of the witnesses was an accomplice. He ordered that the proceedings be returned to the district court with a direction to convict the two accused on all eleven counts as charged. This the learned magistrate duly did on November 22, 1962, after which he sentenced both accused to two and a half years' imprisonment, on each count, the sentences to run concurrently.

The second accused appealed to the Court of Appeal for Eastern Africa (*Ismail (Jaffer Gulamhussein) v. Republic*, (1) [1963] E.A. 55 (C.A.)) against Biron, J.'s judgment in the case stated, but the Court of Appeal ordered that the appeal be struck out as incompetent, and in the course of its judgment referred with approval to *Johnston v. R.* (2) (1951), 18 E.A.C.A. 278, which lays down that no appeal lies to the Court of Appeal from a decision of the High Court on a question of law arising on a case stated. Both accused then appealed to the High Court against the judgment, conviction and sentence of the learned resident magistrate in the district court.

These appeals have now been consolidated. Mr. Fraser Murray appears for the second appellant (Jaffer Gulamhussein Ismail) and was kind enough to present arguments on behalf of the first appellant (Abdalla Isado) who was unrepresented. The petition of appeal of the second appellant contained two grounds only, the second of which contended that the direction to convict given by Biron, J., was made without jurisdiction. This second ground was with-drawn by Mr. Fraser Murray at the hearing; he also applied for leave to substitute an alternative ground, contending that the learned resident magistrate was entitled to regard all the witnesses as accomplices, notwithstanding Biron, J.'s direction that one of them (No. 8) was not an accomplice. Mr. Taylor (State Attorney) opposed this application, on the ground that anything decided by Biron, J., in the course of the case stated was final and conclusive, as provided by s. 337 of the Criminal Procedure Code, and therefore incapable of forming the subject of an appeal, whether to the Court of Appeal or to the High Court. We have not found it necessary to come to a decision on this point, and confine ourselves to observing that the law appears to be contained in the judgment of the Court of Appeal in *Johnston's* case (2), at p. 280:

"An accused person is in no way prejudiced by the finality of the decision of the High Court (on the case stated). If he is subsequently convicted in the subordinate court, he still has his ordinary right of appeal."

In other words it would seem that although the decision of the High Court on a case stated is final and conclusive so as to preclude any appeal to the Court of Appeal against such decision, an accused person who is subsequently convicted by a subordinate court acting on such decision is not to be in any way prejudiced thereby on appeal from the subordinate court to the High Court, and he may appeal on a question of law even if such question has been the subject of a decision by the High Court on a case stated, unless the case was stated at his request, in which case it may be that he is bound by the High Court's decision on the question of law. In this connection we refer to the judgment of Whitley, C.J., in *Simpson v. District Council of Nakuru* (3) (1939), 6 E.A.C.A. 83, at pp. 86–88, and to the judgment of the Court of Appeal in *R. v. Ibrahim H. Lakhani* (4) (1943), 10 E.A.C.A. 107, which support this view.

The reason why we have not found it necessary to decide this point is because in our opinion these appeals must succeed after consideration of the first ground of appeal advanced by the second appellant. This deals with a matter outside the case stated and there can therefore be no doubt that a right of appeal lies. Indeed, this was expressly held in *Simpson's* case (3). The first ground reads as follows:

- “1. The conviction of the appellant is based entirely on the evidence of the 6th to 10th prosecution witnesses (inclusive). The learned magistrate did not accept the testimony of these witnesses as true and indeed expressly found them to be unreliable. A finding that the evidence of these witnesses or some or at least one of them was true was essential to a conviction.”

As Mr. Murray submitted, if a witness is not believed, it is irrelevant whether he is an accomplice or not. In remitting the proceedings to the lower court with a direction to convict, Biron, J., said:

“But for his finding that the case against the two accused rests on uncorroborated accomplice evidence, the learned magistrate would have convicted the two accused.”

What the learned magistrate in fact said of these witnesses was that they were all accomplices and that he found the evidence of all of them unreliable “even were there the necessary corroboration”. We think the learned magistrate must have meant “even if they were not accomplices”, but we must take his judgment as we find it. It is true, as Mr. Taylor has pointed out, that the general tenor of the learned magistrate’s judgment is to the effect that he had little doubt as to the appellants’ guilt. He used expressions like “with the very greatest reluctance I must acquit” and “I have practically no doubt of the guilt of accused No. 2”. For this appeal to fail, we would have to be sure that the learned magistrate would have convicted, at the trial, had he found that witness No. 8 was not an accomplice. We are not sure of this. On the contrary, the learned magistrate expressly stated that he considered all the witnesses, including No. 8, to be unreliable, and their evidence unacceptable even if corroborated.

In the face of this unequivocal statement, we can only say that, if the question whether or not to convict had been left to the learned magistrate, it is not certain that he would have convicted even if he had considered witness No. 8 as not being an accomplice. Furthermore, as Mr. Murray submitted, the use by the learned magistrate of the expression “I have practically no doubt” indicates the existence of some degree of doubt in the magistrate’s mind.

It is unfortunate that the proceedings in the case stated were not returned to the lower court with a direction to the trial magistrate to reconsider his judgment in the light of the High Court’s finding that witness No. 8 was not an accomplice, rather than with a direction to convict. In our view, a lower court should not be directed to convict unless its findings as embodied in its judgment are such that a conviction is inevitable. In this case there was no finding at all as to the truthfulness of any of the alleged accomplices, so that even if the High Court had found that none of them was an accomplice, it does not necessarily follow that the trial magistrate must have convicted. He might still not have considered a single one of them as having been truthful. Furthermore, a decision to convict (if arrived at by the trial magistrate) would have involved some statement by him as to the degree of doubt, if any, existing in his mind.

These consolidated appeals succeed. The convictions are quashed, and the sentences set aside. Both appellants must be set at liberty forthwith, unless either appellant is lawfully held on any other charge.

*Appeal allowed. Convictions and sentences set aside.*

For the first appellant:

*WD Fraser Murray*  
*Fraser Murray, Thornton & Co, Dar-es-Salaam*

The second appellant did not appear and was not represented.

For the respondent:  
*AE Taylor* (State Attorney, Tanganyika)  
*The Attorney-General, Tanganyika*

**Joakim Michael v Republic**  
**[1963] 1 EA 235 (HCT)**

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 26 March 1963                             |
| <b>Case Number:</b>      | 23/1963                                   |
| <b>Before:</b>           | Weston J                                  |
| <b>Sourced by:</b>       | LawAfrica                                 |

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*[1] Firearms – Transferring firearm without permit – Meaning of “transfer” – Arms and Ammunition Ordinance (Cap. 223), s. 15 (T.) – Bankruptcy Act, 1849, s. 67.*

**Editor’s Summary**

The accused was charged with transferring to another his shotgun and ammunition without a permit, contrary to s. 15 of the Arms and Ammunition Ordinance. When the charge was read over and explained to the accused he said: “That is true. I handed that man my shotgun and sixteen rounds of ammunition. I had no police permit.” The magistrate held that the accused’s answers amounted to an unequivocal plea of guilty and convicted the accused. In revision,

**Held –**

- (i) the association of the word “transfer” in s. 15 of the Arms and Ammunition Ordinance, with the words “sell” and “buy” and the use of the expression “either by way of gift or for any consideration”, clearly shows that the intention is to restrict “transfer” to any disposition analogous to sale or gift; that is to say, to any disposition as a result of which the property in the arms or ammunition passes.
- (ii) nothing that the accused said, nor his concurrence with the facts as stated to the court by the prosecuting officer, amounted to an unequivocal admission of any transaction by which the property in the shotgun and the ammunition passed to the person to whom the same were handed.
- (iii) accordingly, the magistrate was wrong in law to enter a plea of guilty and the trial was a nullity.

Conviction quashed.

**Cases referred to in judgment:**

- (1) *Hussein Mbaya v. R.*, Tanganyika High Court Criminal Appeal No. 483 of 1962 (unreported).
- (2) *Warden v. Dean of St. Paul's* (1817), 4 Price 65.
- (3) *Isitt v. Beeston* (1869), L.R. 4 Ex. 159.
- (4) *Cotton v. James* (1830), 8 L.J.K.B. 345.
- (5) *Biggs v. Mitchell* (1862), 31 L.J.M.C. 163.

The accused did not appear and was not represented.

D. M. MacDonagh (State Attorney, Tanganyika) for the Republic.

**Judgment**

**Weston J:** The accused was convicted in the district court of Songea District at Songea on his plea to a charge laid under s. 15 of the Arms and Ammunition Ordinance, the particulars being that he  
“did transfer his shotgun No. 5187727 with sixteen rounds of ammunition to one Mustafa Goya without permit”.

He was fined Shs. 50/-.

On March 21 last, on revision, I quashed the conviction and order the fine to be refunded to the accused after hearing learned state attorney, who conceded that the conviction could not be supported. I now give my reasons.

When the charge was read over and explained to the accused he is recorded as having said:

“That is true. I handed that man my shotgun, and sixteen rounds of ammunition. I had no police permit.”

A plea of guilty was entered.

The prosecuting officer then gave the court the facts in the following terms:

“Accused lives at Lindi, and brought his shotgun on a journey to Songea. On the way, at Mchomoro he handed his gun to Mustafa Goya, with sixteen rounds of ammunition. He left the man with the gun and ammunition, and went to Songea. The same day the police found Mustafa in possession of the gun and ammunition. Asked to show licence. No licence and present facts disclosed – no transfer permit. The gun was impounded, and Mustafa charged and fined Shs. 80/- for having gun without licence. At the time Mustafa was found in possession accused was in Songea fifty seven miles away.”

The accused agreed these facts and in answer to a question by the court, he added: “I just gave it to him to look after. For no particular reason.”

In passing sentence the magistrate gave his reasons for coming to the conclusion that the accused had admitted the transfer of the gun and ammunition as charged, and that his answers had amounted to an unequivocal plea of guilty.

A difficult point of law was involved, namely the interpretation of the word “transfer” in the context of s. 15 of the Arms and Ammunition Ordinance (Cap. 223) which reads as follows:

“No person shall sell or transfer or buy or accept any arms or ammunition, either by way of gift or for any consideration, except in accordance with a permit signed by an authorized officer: Provided that no such permit shall be required in the case of the sale or transfer of gunpowder or caps by a local authority to a native who is in possession of a valid arms licence or to the purchase or acceptance by a native of gunpowder or caps from a local authority.”

In my view the magistrate came to the wrong conclusion but I would pay tribute to the anxious care with which, it is manifest, he approached the problem before him and the lucidity of his argument even though I find myself unable to agree with it.

This argument reads, in so far as it is material:

“I have admitted the accused’s plea as one of guilty after considerable hesitation. This hesitation is caused through the terms of the judgment in High Court Appeal No. 483 of 1962 being an appeal against the conviction imposed by this court in Criminal Case No. 238 of 1962.

“2. In the appeal mentioned a conviction entered by the court on a charge under s. 15 was quashed, the learned judge holding that a ‘transfer’ within the relevant section was ‘not intended to cover mere temporary loans for a matter of minutes’, stating later in his judgment:

“The question as to the propriety of the conviction on the first count can I think, be decided shortly on the ground that the mere temporary loan by the appellant to Oigan of the rifle *in the circumstances* did not in my view amount to a transfer as contemplated by s. 15 of the Arms and Ammunition Ordinance.’

“3. The present case is clearly distinguishable from that dealt with by the High Court on appeal in so far as the transfer was not a ‘mere temporary

loan for a matter of minutes' but a loan for an undefined period, and, secondly, in my opinion more important, the accused in transferring the possession of the gun and ammunition, gave the transferee unrestricted use of the gun, he leaving it in the possession of the transferee. In Criminal Appeal 483/62 the transferee had used the weapon transferred in the presence and under the directions of the licensed holder.

- "4. Whilst there is a clear distinction between the two cases, my difficulty arises from certain submissions made by counsel for the appellant in Criminal Appeal No. 483/62, on which submissions no ruling was given by the court. The gist of those submissions was that 'transfer' within the meaning of s. 15 was clearly intended to deal with transfers of a permanent nature which passed the property in the weapon. As stated, no specific ruling was given on this submission, the court ruling that a conviction was wrong 'in the circumstances', i.e. for a duration of a few minutes and under the direction and control of the owner. If however these submissions are correct, it is clear that the plea in the present case has been wrongly admitted.
- "5. In my opinion the submission is of doubtful validity for two reasons. Firstly, if the ordinary meaning is given- to the word 'transfer' (defined in the Concise Oxford Dictionary as 'the making over of possession' (as opposed to property)) there is no reason why s. 15 should not apply to temporary as well as permanent transfers. I confess however that this argument is not very forceful when transfer is read in the context of 'sell' 'buy' by 'way of gift', etc. The second reason is more practical application. Section 15 reads:

'No person shall transfer . . . except in accordance with a permit signed by an authorised officer';

and it would appear that this section is amplified by the provisions of reg. 16 and reg. 17 of the Arms and Ammunition Regulations relating to temporary, and permanent transfers respectively. Regulation 16 and reg. 17 appear to create no offence, and would appear to be in the nature of administrative directions for the implementation of the provisions of s. 15, which does presumably create an offence. A permanent transfer not in accord with reg. 17 would be an offence under s. 15, and it would appear reasonable to assume that a temporary transfer not in accord with reg. 16 would also constitute an offence under s. 15, unless the circumstances were a mere loan for a matter of minutes. Otherwise, the issue of a permit for a temporary transfer under reg. 16 would be a meaningless bureaucratic exercise."

In my judgment, the submission of learned counsel in *Hussein Mbaya v. R.* (1) Tanganyika High Court Criminal Appeal No. 483 of 1962 (unreported), is valid. The principle to be applied – and which indeed the magistrate here adverted to but unfortunately rejected – is thus stated in Maxwell on Interpretation of Statutes (10th Edn.), at p. 332:

"When two or more words which are susceptible of analogous meaning are coupled together noscuntur a sociis. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general."

This principle is well settled. Maxwell on Interpretation of Statutes cites as authority, amongst others, the case of *Warden v. Dean of St. Paul's* (2) (1817), 4 Price 65, in which

“an Act (37 Hen. 8, c. 12) which exempted ‘magnates and noblemen’ from tithes was held, on this ground, not to extend to an ecclesiastical magnate, such as a dean, but to apply only to magnates of a ‘noble’ kind” – not that is to the noblesse de robe, but only to the noblesse d’épée.

Again, s. 67 of the Bankruptcy Act of 1849 (12 and 13 Victoria, c. 106)

“which made a fraudulent ‘gift, delivery, or transfer’ of property an act of bankruptcy, included only such deliveries or transfers as were of the nature of a gift, that is, such only as altered the ownership of the property. It did not include a delivery to a bailee for safe custody”.

The authority for that is *Isitt v. Beeston* (3) (1869), L.R. 4 Ex. 159, following *Cotton v. James* (4) (1830), 8 L.J.K.B. 345.

The principle applies equally to the construction of penal statutes, and the same authority – Maxwell – refers to *Biggs v. Mitchell* (5) (1862), 31 L.J.M.C. 163, which is particularly apt here. By 12 Geo. 3, c. 61 (repealed by the Gunpowder Act, 1860 (c. 139), s. 1, the “having or keeping” of gunpowder was prohibited. It was held not to apply

“to a person who ‘has’ gunpowder for a merely temporary purpose, as a carrier, the kind of ‘having’ intended by the Act being explained by the word ‘keeping’ with which it was associated”.

Returning to s. 15 of the Arms and Ammunition Ordinance, it seems to me that the association of the word “transfer” with the words “sell” and “buy” and the use of the expression “either by way of gift or for any consideration”, clearly shows that the intention is to restrict “transfer” to any disposition analogous to sale or gift; that is to say, to any disposition as the result of which the property in the arms or ammunition concerned passes.

In this case, nothing that the accused said, or his agreement with the facts as stated to the court by the prosecuting officer, amounted to an unequivocal admission of any such transaction, and for this reason it was in my opinion wrong in law to enter a plea of guilty. The trial accordingly was a nullity and the conviction bad, with the result mentioned.

The Director of Public Prosecutions informed me that he did not wish to make an application for a re-trial and I refrained from making any such order.

*Conviction quashed.*

The accused did not appear and was not represented.

For the Republic:

*DM MacDonagh* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

## **Zarina Akbarali Shariff and another v Noshir Pirosesha Sethna and others** [1963] 1 EA 239 (CAM)

**Division:** Court of Appeal at Mombasa

**Date of judgment:** 19 June 1963

**Case Number:** 83/1962

**Before:** Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA  
**Sourced by:** LawAfrica  
**Appeal from:** H.M. Supreme Court of Kenya – Pelly Murphy, J

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*[1] Evidence – Admissibility – Admissions – Statement made to police – Deposition taken in a criminal case – Whole statements admitted in evidence – Indian Evidence Act, 1872, s. 17.*

*[2] Negligence – Collision at cross-roads – Duty of driver to take precautions – Major and minor road – “Yield” sign on minor road – No “slow” or warning sign on major road – Scooter emerging from minor road – No proper look-out kept and no slowing down – Speed between twenty and twenty-five miles an hour – Van travelling on major road at same speed – Prospect of danger emerging reasonably apparent to van driver – Van driver’s assumption that traffic on minor road would conform to “Yield” sign – Contributory negligence.*

*[3] Tort – Negligence – Collision – Contributory negligence – Concurrent and joint tortfeasors – Apportionment of liability – Damages apportioned by judge between tortfeasors – When appellate court will interfere – Whether judgment should have been entered jointly and severally against all tortfeasors.*

### **Editor’s Summary**

A motor scooter driven by the first respondent on a minor road and a motor van driven by the second respondent on a major road came into collision near the centre of the intersection of the two roads causing the death of one A., who was a pillion passenger on the scooter. The appellants, as administrators of the deceased, claimed damages against the first and second respondents, alleging negligence, and against the third respondent company as owner of the van, the second respondent being the company’s agent at the material time. There was evidence that there was a “Yield” sign on the minor road about fifty-four feet from the intersection, but there was no “slow” or other warning sign on the major road. An extra-judicial statement by the second respondent to the police relative to the accident and his deposition taken by a magistrate in criminal proceedings against the first respondent were put in evidence after an objection to their admissibility had been over-ruled. The trial judge found that the first respondent was negligent in approaching the intersection too fast, namely, 20 to 25 miles an hour, and that he did not keep a proper look-out. The judge found that the second respondent was not entitled to assume (as he had apparently done) that all vehicles travelling on the minor road would, at the junction, give way to traffic on the major road; and that he was negligent in approaching the intersection too fast, namely, 20 to 25 miles an hour, and in not looking to his left on entering the intersection. Having found that both the first and second respondents were negligent the judge also held that their negligence was a contributory cause of the collision, the first respondent being three quarters to blame and the second respondent one quarter to blame. The judge awarded general and special damages in the sum of £4,825, and entered judgment against the first respondent for the sum of £3,618 15s. 0d. and against the second and third respondents jointly and severally for the sum of £1,026 5s. 0d., together with costs against all three respondents apportioned in the same way. The appellants appealed on the ground that the first and second respondents being concurrent tortfeasors judgment should have been entered



against all three respondents jointly and severally. The second and third respondents cross-appealed against the finding that the second respondent was negligent and that his negligence was a contributory cause of the collision and against the quantum of damages awarded. It was contended that the facts found by the judge did not establish any negligence on the part of the second respondent, that the speed with which the van was travelling was a reasonable speed in the circumstances, that a motorist on a major road on which there is no warning sign is entitled to proceed on the assumption that traffic on a minor road will conform to traffic signs and not behave negligently and, therefore, that it did not matter that the second respondent did not look to his left on entering the intersection. It was also submitted for the respondents that only facts of the extra-judicial statement and deposition should have been admitted by the judge.

**Held –**

- (i) when an admission is tendered against party, he is entitled to have proved, as part of his adversary's case, so much of the whole statement or document containing the admission, as is necessary to explain the admission, although such other parts may be favourable to him; the usual practice is to tender the whole statement or document containing the admission; accordingly there could be no objection to the whole of the statements being admitted in evidence.
- (ii) the second appellant was not entitled to ignore traffic approaching the intersection along the minor road and to assume, as he did, that such traffic would conform to the "Yield" sign and as it was his duty to keep a proper lookout to his left, he was negligent in failing to do so.

*London Passenger Transport Board v. Upson*, [1949] 1 All E.R. 60, applied.

- (iii) there was no ground for interfering with the judge's apportionment of one quarter of the blame to the second respondent.
- (iv) the finding of a trial judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances.
- (v) it could not be said that the judge attached insufficient weight to the likelihood of the widow's remarriage or that fourteen years' purchase, taking into consideration the youth of the deceased and his dependants, was excessive.
- (vi) the damages awarded were, perhaps, on the high side, but not so inordinately high as to justify interference by an appellate court.
- (vii) the first and second respondents were concurrent tortfeasors and the second and third respondents as between themselves were joint tortfeasors and all three were liable jointly and severally for the whole damage; accordingly judgment should have been entered for the appellants against the first, second and third respondents, jointly and severally, in the sum of £4,825 and costs.

Appeal allowed. Cross-appeal dismissed.

**Cases referred to in judgment:**

- (1) *Browne v. Central S.M.T. Co.*, [1949] S.C. 9; 36 Digest (Repl.) 103, 755.
- (2) *Lang v. The London Transport Executive*, [1959] 3 All E.R. 609.

- (3) *Fardon v. Harcourt-Rivington*, [1932] All E.R. Rep. 81.
- (4) *London Passenger Transport Board v. Upson*, [1949] 1 All E.R. 60; [1949] A.C. 155.
- (5) *Upson v. London Passenger Transport Board*, [1947] 2 All E.R. 509.
- (6) *Williams v. Fullerton* (1961), The Times, March 14th.
- (7) *British Fame (Owners) v. MacGregor (Owners)*, [1943] 1 All E.R. 33.
- (8) *Nunn v. Cocksedge Ltd.*, cited in Kemp and Kemp on the Quantum of Damages (2nd Edn.), Vol. 2, p. 87.

(9) *Dingle v. Associated Newspapers Ltd.*, [1961] 1 All E.R. 897.

(10) *Drinkwater v. Kimber*, [1952] 1 All E.R. 701.

(11) *James Ngaya v. Beers*, [1961] E.A. 390 (C.A.).

June 19. The following judgments were read.

### Judgement

**Sir Ronald Sinclair P:** This is an appeal and cross-appeal from a judgment of the Supreme Court of Kenya. At about 12.30 p.m. on Sunday, March 19, 1961, a motor scooter driven by the first respondent and a motor van driven by the second respondent came into collision at the intersection of Arab Road and Riyami Road, Mombasa. As a result of the collision Akberali Manji Shariff, who was a pillion passenger on the scooter, was killed. The appellants, who were the plaintiffs in the suit, are the administrators of the estate of the deceased man. They claimed damages for the benefit of the deceased's dependants against the first and second respondents, alleging that each was negligent in the manner in which he drove on the occasion in question, and against the third respondent company as owner of the van, the second respondent being the company's agent at the material time. The learned judge found that both the first and second respondents were negligent and that their negligence was a contributory cause of the collision, the first respondent being three quarters to blame and the second respondent one quarter to blame. He awarded general damages in the sum of £4,800 and agreed special damages in the sum of £25. He entered judgment against the first respondent for the sum of £3,618 15s. 0d. and against the second and third respondents jointly and severally for the sum of £1,206 5s. 0d., together with costs against all three respondents apportioned in the same way.

The appellants appeal on the ground that the first and second respondents being concurrent tortfeasors, judgment should have been entered against all three respondents jointly and severally. The second and third respondents cross-appeal against the finding that the second respondent was negligent and that his negligence was a contributory cause of the collision and against the quantum of damages awarded. Although the first respondent filed a defence, he did not appear nor was he represented at the trial or at the hearing of the appeal.

I shall first deal with the cross-appeal. At the trial the appellants put in evidence an extra-judicial statement made by the second respondent to the police in connection with the accident the subject matter of the suit, and his deposition taken by a magistrate in a criminal case in which the first respondent was charged with two offences under the Traffic Ordinance, 1953, arising out of the accident. Objections to the admissibility of those documents were overruled by the trial judge. As I understood Mr. Gautama, who appeared for the second and third respondents, he submitted that while such portions of the statements as constituted admissions were admissible in evidence, the whole of the statements were not admissible. In my view there is no substance in that submission. Admissions are dealt with in s. 17 et seq. of the Indian Evidence Act. The general rule is that admissions by a party to the proceedings are admissible against, but not in favour of, such party, to prove the truth of the facts stated. But, when an admission is tendered against a party, he is entitled to have proved, as part of his adversary's case, so much of the whole statement, or document containing the admission, as is necessary to explain the admission although such other parts may be favourable to himself. The usual practice is to tender the whole statement or document containing the admission.

I accept as a correct statement of principle the following passage from Sarkar on Evidence (10th Edn.), p. 168:

“The first important rule with regard to admissions is, that the whole statement containing the admission must be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him, cannot be ascertained (*Thompson v. Austin* (1823), 2 D. & R. 361). But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit (*Bermon v. Woodbridge* (1781), 2 Doug. 788).”

There could, therefore, be no objection to the whole of the statements being admitted in evidence.

I turn now to the facts found by the learned judge. At the time of the collision the scooter was being driven in a northerly direction along Arab Road and the van in a westerly direction along Riyami Road. The collision occurred near the centre of the intersection. The surfaces of both roads were of asphalt in reasonable condition. Riyami Road is a major road in relation to Arab Road. At the material time there was a “Yield” sign on the western side of Arab Road south of the intersection and fifty-four feet from the intersection so that traffic on Arab Road was required to yield to traffic on Riyami Road. There was no “Slow” or other warning sign in Riyami Road. A two-storied dwelling-house on the south-east corner of the intersection considerably limited the ability of a driver of a vehicle travelling in a northerly direction along Arab Road to see vehicles travelling in a westerly direction along Riyami Road and vice versa. The driver of the scooter, the first respondent, did not see the “Yield” sign at all and did not see the van until he was about the middle of the intersection. At the time of impact the speed of the scooter was twenty to twenty-five miles an hour. The driver of the van, the second respondent, approached the intersection at approximately twenty to twenty-five miles an hour and started to cross the intersection maintaining that speed. He did not look to his left on entering the intersection and he first saw the scooter when it was seven or eight feet from his van. He knew the intersection well and knew that it was a “through” road. In his evidence in the magistrate’s court he said “when I drive and the road is through I continue my speed”.

The learned judge found that the first respondent was negligent in that he approached the intersection at too high a speed and did not keep a proper look-out. His conclusion with regard to the second respondent was as follows:

“In my opinion the second defendant should have approached the junction at such a speed as would have enabled him to see a vehicle coming into the junction from Arab Road, either from the right or from the left, in sufficient time to stop in order to avoid a collision with such a vehicle provided that such vehicle was not being driven at a speed which was so excessive that the second defendant could not have seen it in time. The second defendant has admitted that, had he looked to the left on entering the junction, he could have seen as far as the yield sign in Arab Road. I have come to the conclusion that the scooter was not travelling at a speed which was so excessive that the second defendant could not, if he had kept a proper look-out, have seen the scooter in time to avoid a collision. I do not consider that the second defendant was entitled to assume, as apparently he did, that, because he had the right of way, he was under no duty to slacken speed when crossing the junction. I agree with Mr. Gautama that

the facts in *Lang v. The London Transport Executive*, [1959] 3 All E.R. 609, are different in many respects from the facts in this case. But here, as there, the driver on the major road knew the junction well. I think that the possibility of danger from traffic emerging from Arab Road was reasonably apparent to the second defendant. I do not think that he was entitled to assume (as apparently he did) that all vehicles travelling on Arab Road would, at the junction, give way to traffic on Riyami Road. I have come to the conclusion that the second defendant was negligent and that his negligence, although minor when compared with that of the first defendant, was a contributory cause of the collision. I find that the first defendant was three quarters to blame and that the second defendant was one quarter to blame.”

Mr. Gautama did not dispute the judge’s findings as to the primary facts save in one respect. He contended that there was nothing in the evidence to exclude the possibility that the second respondent looked to his left and that it is obvious he must have done so when he saw the scooter seven or eight feet away. The judge’s finding was not that the second respondent did not look to the left at any time before the collision, but that he did not do so on entering the intersection. It is perfectly clear from his evidence given before the magistrate that he did not look to his left on entering the intersection.

Mr. Gautama’s main contention was, however, that the facts found by the learned judge did not establish any negligence on the part of the second respondent. He submitted that the speed of twenty to twenty-five miles an hour at which the van was travelling was a reasonable speed in the circumstances: that a motorist on a major road on which there is no warning sign is entitled to proceed on the assumption that traffic on a minor road will conform to traffic signs and not behave negligently and, therefore, that it matters not that the second respondent did not look to his left on entering the intersection. In support of his submission he relied on the decision in the Court of Session in *Browne v. Central S.M.T. Co.* (1), [1949] S.C. 9; 36 Digest (Repl.) 103, 755. As to the decision in *Lang v. The London Transport Executive* (2), [1959] 3 All E.R. 609, to which the learned judge referred, he said it should not be followed.

The report of the decision in *Browne v. Central S.M.T. Co.* (1), is not available here and the passages from that case to which I shall refer are taken from the report of *Lang’s* case (2). The headnote in *Browne v. Central S.M.T. Co.* (1), reads:

“A collision occurred at the junction of a major road and a minor road between an omnibus which was travelling on the major road and a motor cycle which, emerging from the minor road, attempted to cross the major road. A boy who was a pillion passenger on the motor cycle was killed. At the trial of an action brought by the boy’s father against the owners of the omnibus on the ground of the driver’s negligence, the evidence established gross fault on the part of the motor cyclist. He had, as he admitted, failed to notice a ‘Slow, Major Road Ahead’ sign erected a short distance from the junction, and had not seen the omnibus which was approaching the junction, although it must have been plainly visible. The omnibus had approached the crossing at its ordinary moderate speed of some twenty-five miles an hour, and the driver, when a collision seemed to be imminent, had braked and swerved in an unsuccessful effort to avoid the motor cycle.”

It was held by the Court of Session:

“that the driver of the omnibus had not been negligent, seeing that, as a driver on a main road, he was entitled, in the absence of any indication

to the contrary, to assume that the motor cyclist, a driver on a side road, would conform to the warning signal and either stop or slow down and give him the right of way; and a verdict of the jury in favour of the pursuer (the deceased boy's father) set aside."

The Lord Justice-Clerk (Lord Thomson) said this:

"The omnibus driver was not entitled to rely absolutely on the fact that he was on a major road and had the right of way. He was bound to exercise the right of being on the main road in a reasonable way. He had to watch and conform to the movement of other traffic which was in the offing, and he must take due care to avoid collision with it. So it comes to this, was the jury entitled to think that the omnibus, despite its *prima facie* right of way, should have surrendered that right in anticipation of possible failure on the part of the cyclist to note the safe course?

"The answer to this must turn on the conduct of the motor bicycle and on the opportunities which the omnibus driver had of observing it. There must be something in the conduct of the bicycle which the omnibus driver ought to have seen and which would have certiorated him, had he been taking proper care, that the motor bicycle was not going to pass behind but was going to try to pass in front of the omnibus. What then is the evidence on this issue?"

"He held in the circumstances that it was not a reasonable verdict."

Lord Mackay, said this:

"I have no doubt that anyone driving on a road such as this Cambuslang-Glasgow road, which of course is the main road too for motor as well as tramway traffic, is entitled to go on that road in proper position and is entitled to keep his proper place on that road, and to do so in reliance on side road traffic behaving itself as the rules of the road desired, until it may be at the very last moment some observation of a gross infringement by others calls for a special attempt to deal with it."

Lord Birnam, said:

"Speaking for myself, I think it would be a pity if the court were to give any countenance to the view that the driver of a vehicle on a major road when approaching a side road such as the one in question in broad daylight must slow down to a pace of ten miles per hour or otherwise share the blame for any collision that may happen."

*Lang's* case (2), involved a claim for damages by the widow of a motor cyclist against the owners of a motor bus belonging to the London Transport Executive. The motor cyclist emerged from a minor side road on to a major road and collided, at the junction of the two roads, with the bus which was travelling along the major road. The motor cyclist was killed. About 180 feet from the mouth of the side road there was a "Slow, Major Road Ahead" sign, and it was the duty of traffic approaching the junction to observe this sign and to keep a look-out for traffic on the major road before emerging from the side road. The traffic on the major road was clearly visible from the side road; when he approached the junction, he did not slow down but carried on at the same speed, straight out on to the major road. The bus was travelling along the major road at a speed of not more than twenty miles an hour. Just after passing a "Slow" sign about 190 feet from the junction, the bus driver glanced in the direction of the side road, as was his usual custom, and saw that there were some cyclists moving along it, although he could not identify the deceased as one of the cyclists; he did not look into the side road again. The bus driver knew that there was a major road sign in this side road, but he was aware from experience that

people would suddenly emerge from a side road when it was unwise to do so. It was held that the possibility of danger was reasonably apparent and that the bus driver was negligent in not taking the precaution of looking at the traffic in the side road as he approached it to see whether the motor cyclist was still moving at twenty miles an hour and obviously intending to cross the major road. That was a decision of a single judge, Havers, J. He considered, but did not follow, the decision in *Browne v. Central S.M.T. Co.* (1), and applied the principle stated by Lord Dunedin, in *Fardon v. Harcourt-Rivington* (3), [1932] All E.R. Rep. 81, and dicta in *London Passenger Transport Board v. Upson* (4), [1949] 1 All E.R. 60.

The principle enunciated by Lord Dunedin, in *Fardon v. Harcourt-Rivington* (3), which Havers, J., applied is as follows:

“If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.”

In *Upson's* case (4), a pedestrian was knocked down by an omnibus while on a pedestrian crossing controlled by traffic lights. The lights were in favour of the omnibus driver, but his view of the crossing was masked by a stationary taxi-cab which was drawn up at the kerb on the crossing. The trial judge found the driver of the omnibus guilty of negligence at common law. The Court of Appeal by a majority reversed the finding: Lord Greene, M.R., dissented, but Cohen and Asquith, L.JJ., reversed the finding of the judge on the question of common law negligence and found the driver guilty of a breach of the Pedestrian Crossing Places (Traffic) Regulations, 1941. Lord Greene, dissented and attached no blame to the driver. The House of Lords unanimously approved the decision of the Court of Appeal as regards the liability of the bus driver under the Pedestrian Crossing Places (Traffic) Regulations, 1941. Lord Porter agreed with the Court of Appeal that there was no negligence. Lord Wright and Lord Uthwatt, did not express any opinion on the question of negligence, but Lord du Parc and Lord Morton, both thought that the driver was negligent. Four of the five law lords criticised the view expressed by Lord Greene in his judgment that drivers are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, would behave with reasonable care. Lord Greene said in *Upson v. London Passenger Transport Board* (5), [1947] 2 All E.R. 509 at p. 511:

“The true view, in my opinion, is that a driver approaching a controlled crossing, whether it be controlled by lights or by the police, with the light signal or the police signal in his favour, is entitled to proceed on the assumption that pedestrians will conform to the directions given to them as to what their behaviour should be when the signals are against them, and that he is under no duty to keep a look-out for the possibility of a pedestrian disobeying the signals or to drive on the assumption that a pedestrian may at any minute do so.”

Later in his judgment he said (at p. 512 of that report):

“The truth is that, if drivers were not entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, would behave with reasonable care, all traffic would come to a standstill, since everyone at his peril would have to act on the hypothesis that his neighbour might at any moment put his own life in danger by behaving in a negligent manner.”

In his speech Lord du Parc said that the propositions advanced by Lord Greene did not accord with the law as it had been laid down by the House of



Lords and that the correct principle was that stated by Lord Dunedin in *Fardon v. Harcourt-Rivington* (3). He then quoted the passage from Lord Dunedin's speech which I have set out earlier in this judgment and continued at p. 72:

"I regard this statement and that of Lord MacMillan in the same case, which was to the like effect, as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others. It must follow that (if I may repeat what I said [1948] 2 All E.R. 247) in *Grant v. Sun Shipping Co. Ltd.*, in this House):

'... a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common.'

The driver of the appellants' omnibus agreed in cross-examination that he knew

'... that people in London have a habit of crossing a road when the lights are not in their favour'.

Even apart from the duty imposed on him by the regulations, he was, therefore, bound to take precautions against the possibility that some person was concealed from his view by the stationary cab and might suddenly emerge from its protection. On this ground alone, it must at least be said that there was evidence to support the conclusion that the driver had failed to take reasonable care for the safety of others and was, therefore, negligent. A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are, in fact, likely to do. It is true that in some circumstances it is not reasonably possible for a driver to do anything to save a pedestrian from the consequences of the pedestrian's own act, just as the pedestrian can sometimes truly say that, although he knows that drivers are sometimes negligent, he could not reasonably have been expected to avoid the particular act of negligence which has caused him injury. These are questions for a jury, but I must say, with all respect, that a direction to a jury in the terms of the propositions enunciated by the learned Master of the Rolls would be, in my opinion, unduly favourable to a defendant driver."

Lord Wright agreed with Lord du Parc's criticisms of Lord Greene's judgment. Lord Uthwatt, said:

"I desire only to register my dissent from the view expressed by Lord Greene, M.R. ([1947] 2 All E.R. 512), that drivers are:

'... entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, would behave with reasonable care ...'

It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take. I would dismiss the appeal."

Lord Morton stated that he did not accept without qualification the first of the two passages I have quoted from Lord Greene's judgment.

To return to *Lang's* case (2). Havers, J., pointed out that *Browne v. Central S.M.T. Co.* (1), was tried before the House of Lords had announced its decision in *Upson's* case (4), and thought that in view of the dicta in *Upson's* case (4), he could not follow the reasoning in *Browne v. Central S.M.T. Co.* (1). He felt he was bound to follow the principle enunciated by Lord Dunedin. Applying that principle he concluded (p. 617 of the report):



“If he [the bus driver] had looked in my view the possibility of danger occurring would have been reasonably apparent to him. If he had looked, he could have stopped in time to allow the deceased to cross in front of him. He did not do so, and never saw the deceased again until the two vehicles were on top of one another. In this respect I find that he failed to take reasonable care for the safety of other traffic on the road, and was therefore negligent. He made a mistake in assuming that the deceased would not do what his experience should have taught him that persons in fact sometimes do.”

There is one further case to which I wish to refer, *Williams v. Fullerton* (6) (1961), *The Times*, March 14, a decision of the Court of Appeal. It was not cited by counsel, but it is mentioned in *Charlesworth on Negligence* (4th Edn.), at p. 232, and also in the Supplement to *Bingham’s Motor Claims Cases* (4th Edn). The facts, which are very similar to those in the present case, were as follows. The plaintiffs were passengers in a Ford Pilot car driven by the first defendant’s deceased husband when it collided with a Ford Consul car driven by the second defendant at the junction of Hemingford Road and Richmond Avenue near King’s Cross Station. The second defendant was proceeding along the major road, Richmond Avenue, which had a conventional cross-roads sign, at a reasonable speed, looked right and left at the crossing and did not see anything, but he did not, as indicated by the Highway Code, look left again. The driver of the car in the minor road, Hemingford Road, which had a “Slow, Major Road Ahead” sign, was negligent in crossing the junction at a fast speed and in not paying any attention to the road sign. On the evidence he was travelling at a speed between 30 and 60 miles per hour. Ormerod, L.J., who delivered the first judgment said:

“The case for the second defendant was that a driver on a major road approaching a crossing had no duty to keep a look-out except to see what might reasonably be seen, and that there was no obligation to look out for what travels at an excessive speed, although excessive speed was the commonest form of negligence. The judge had found that the second defendant did not keep as good a look-out as he should have done, and that had he done so the accident might have been avoided. It was impossible to disturb that finding, because had the second defendant looked at the right time or looked properly he must have seen the Ford Pilot car and could have taken avoiding action. If a driver exercises proper care, he approaches a crossing with his foot off the accelerator and ready on the brake to deal with any traffic from the minor road by slowing down or stopping. The appeal must be dismissed.”

Devlin, L.J., delivered a concurring judgment in which he said:

“... it was well established that a driver must guard against the reasonable possibility of danger arising from the carelessness of other drivers. The driving of the deceased man was outrageous; crossing a major road at a speed substantially in excess of the legal speed limit. If the failure of the second defendant had consisted merely in failing to take into account such recklessness, it was at least doubtful if he could be considered negligent. If his case had been that the other vehicle was going so fast that he panicked or that he could not do anything to avoid the accident or that he assumed the other vehicle was going to stop, all these would have been matters which would require to be considered and weighed. But the judge found that he had not kept a proper look-out and that the absence of such a look-out was in part a cause of the accident, and that finding could not be assailed.”

Danckwerts, L.J., agreed.

The principles which were followed in *Browne v. Central S.M.T. Co.* (1), appear to be basically the same as those expressed by Lord Greene, M.R., in the Court of Appeal in *Upson's* case (4), which were expressly dissented from by four of the five law lords on the appeal to the House of Lords. I think that I must apply the principles enunciated by the House of Lords in *Upson's* case (4). It appears to be those principles which were applied by the Court of Appeal in *Williams v. Fullerton* (6).

Applying, therefore, those principles as to the instant case, it is clear that the second respondent was not entitled to ignore traffic approaching the intersection along Arab Road and to assume, as he did, that such traffic would conform to the "Yield" sign. It was his duty to keep a proper look-out to his left and he was negligent in failing to do so. He did not see the scooter until it was only seven or eight feet away. Although he then braked and swerved to the right it was too late to avoid a collision. I do not think *Upson's* case (4), can be distinguished on the ground that the second respondent, unlike the bus driver in *Upson's* case (4), did not say that he knew persons sometimes do not obey traffic signs. It is common experience that they do not and he must or should have been aware of it.

But, was such negligence a contributory cause of the collision? Inspector Rose who took measurements at the scene of the accident and subsequently drew a plan which was put in evidence said this:

"Assuming a vehicle going north along Arab Road and another going west along Riyami Road both at the same speed, the first possible place in which one could reasonably see the other is seventy feet from the red 'dash' between 'B' and 'E' on the plan in either direction."

The vehicles in question, the scooter and the van, were travelling at approximately the same speed. The collision occurred approximately twelve feet west of the centre of the intersection, and the red 'dash' referred to is approximately five feet from the centre of the intersection in the direction of the point of impact. If that evidence is accepted, the second respondent could have seen the scooter when he was more than seventy feet from the point of impact.

On the other hand Mr. Quinion, an insurance surveyor and assessor and "automotive" engineer, who was called as an expert witness by the defence, said:

"From spot in road near 'Pole' in Riyami Road at east of junction it is possible to see yield sign at angle of 45° in Arab Road."

From a point in the centre of Riyami Road opposite the pole referred to, to the point of impact is approximately forty-eight feet. From the "Yield" sign in Arab Road to the point of impact is approximately sixty-five feet.

Mr. Quinion testified that at twenty-five miles an hour thinking distance is twenty-five feet and braking distance is thirty feet, a total of fifty-five feet, and that at twenty miles an hour thinking distance is twenty feet and braking distance is nineteen feet, a total of thirty-nine feet. Even accepting Mr. Quinion's evidence as to the visibility, if the second respondent travelling at twenty to twenty-five miles an hour had braked as soon as he could reasonably have seen the scooter he could have stopped, or almost stopped, before the point of impact. Furthermore, he would have had more time to take other avoiding action. I am satisfied that had the second respondent taken appropriate avoiding action at the time when he first could reasonably have seen the scooter the accident could have been avoided. There is no question of his being misled by the movements of the scooter into thinking it would give way to him for he did not look to his left. Had he done so it must have been obvious to him that the scooter was not going to obey the "Yield" sign and his duty then was to take immediate precautions to avoid an accident.

It was argued that it was the second respondent's duty to look first to his right (where visibility was partially obscured) and that by the time he would have been in a position to look to his left he would have proceeded so far into the intersection that it would have been too late to avoid the collision. But the learned judge found that the second respondent was negligent in approaching the intersection at too high a speed and that such negligence was a contributory cause of the collision. The speed at which a prudent driver approaches an intersection must bear some relation to the nature of the intersection. Such matters as the width of the roads, the number of traffic lanes and the general visibility must always be relevant and each case must be considered on its own facts. Ormerod, L.J.'s, observation in *Williams v. Fullerton* (6), that if a driver exercises proper care, he approaches a crossing with his foot off the accelerator and ready on the brake to deal with any traffic from the minor road by slowing down or stopping, is no doubt to be related to the facts of that case and the nature of the crossing in question. It cannot apply with full force to all crossings. In the present case, however, the crossing was a dangerous one; the roads were comparatively narrow, there was some obstruction of the second respondent's vision to the right and a substantial obstruction on his left. At such an intersection a driver could not justifiably place complete reliance upon an expectation that traffic on the minor road would conform to the requirements of the "Yield" sign. He could not, of course, be expected to cope with every form of reckless or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper look-out, that could be negligence contributing to an accident. In the present case the judge himself inspected the scene of the accident and I am unable to say he was wrong in finding that the speed at which the second respondent approached the intersection was too high in the circumstances, and that his negligence was in some degree a contributing cause of the accident.

Mr. Gautama submitted that the learned judge's apportionment of one quarter of the blame to the second respondent is excessive and ought to be decreased, but I can find no ground for interfering with his finding. The finding of a trial judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances: see *British Fame (Owners) v. MacGregor (Owners)* (7), [1943] 1 All E.R. 33.

I turn now to the quantum of damages. The learned judge awarded general damages of £4,800. The deceased was thirty years of age at the time of his death, the widow at that time being twenty-one years old. There were then two children, the elder aged four and a half years and the younger two and a half years. A third child was born after the death of the deceased. The judge found as follows:

"I estimate the period for which the dependants might have hoped to enjoy benefits from the deceased if he had not been killed at twenty years. I estimate the amount of those benefits at three hundred and fifty pounds – £350 per year. I think that some reduction must be made in view of the possibility of the widow's re-marriage, and for accelerated receipt of benefits. I award general damages in the sum of £4,800. I apportion that sum as follows, the widow to receive £2,400 and the children to receive £800 each."

The judge, therefore, considered all the relevant factors in arriving at his estimate. On the basis of dependency of £350 a year, the award is approximately fourteen

years' purchase of the annual value of the dependency. There are two complaints, first, that the learned judge could not have attached due weight to the likelihood of the widow's remarriage and, second, that fourteen years' purchase is excessive. Mr. Gautama referred us to *Nunn v. Cocksedge, Ltd.* (8), cited in Kemp and Kemp on the Quantum of Damages (2nd Edn.), Vol. 2 at p. 87. The facts of that case as given in Kemp and Kemp were as follows:

"The deceased was a steel erector earning £13 17s. net per week and aged 25 years, when killed. He left a widow aged 26, and two children aged 5 and 3. The value of the dependency at the date of death was between £7 and £9 per week. The trial judge, Oliver, J., expressed the view that the widow was extremely attractive and would probably remarry, and for this reason awarded only £2,610 general damages under the Fatal Accidents Acts. On the basis of a dependency of £8 a week, i.e., £416 a year, this award was just over 6 years' purchase of the annual value of the dependency. The Court of Appeal held that Oliver, J., had given too much weight to the chances of the widow's remarriage and increased the award to £3,860. On the basis of a dependency of £8 a week, this award is just over 9 years' purchase of the annual value of the dependency, £500 was apportioned to each child."

In the present case the widow is younger, which may enhance her chance of remarriage. On the other hand she has three young children which would by many prospective husbands be considered an impediment. Moreover, there is no evidence or finding that she is attractive as in *Nunn's* case (8). The judge saw her in the witness-box and he was in a better position to assess her chances of remarriage than we are. Lastly, being younger, her dependency will be longer if she does not remarry. In *Nunn's* case (8), Denning, L.J., as he then was, said (p. 88 of Kemp and Kemp):

"How sad it will be if, as the years passed by, she did not remarry and yet her compensation had been cut down by the court so drastically on the footing that she would!"

In the circumstances I am not prepared to say that the learned judge attached insufficient weight to the likelihood of the widow's remarriage or that fourteen years' purchase, taking into consideration the youth of the deceased and his dependants, is excessive. The figure of £4,800 is, perhaps, on the high side, but I do not think it is so inordinately high as to justify interference by an appellate court.

In my view, therefore, the cross-appeal fails.

There remains the appeal itself, the ground of appeal being that the learned judge should have entered judgment with costs against all three respondents jointly and severally. Mr. Gautama intimated that, although he did not concede the appeal, he was unable to advance any argument to resist it. In my view the position is clear. The first and second respondents are concurrent tortfeasors and the second and third respondents as between themselves are joint tortfeasors and all three are liable jointly and severally for the whole damage. In *Halsbury's Laws of England* (3rd Edn.), Vol. 37, p. 136, para. 245, the liability of concurrent tortfeasors is stated as follows:

"245. Concurrent and consecutive tortfeasors. If each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. If each of several persons commits an independent tort consecutively against the same person, each is liable for the damage caused by his tortious act, assuming the damage proximately caused by each tort to be distinct."

Glanville Williams on Joint Torts and Contributory Negligence (1st Edn.), p. 3, para. 1, classifies joint torts and several concurrent torts under the heading “Concurrent torts” and later on the same page states:

“Concurrent tortfeasors are, unlike other tortfeasors, liable in full for damage done by all, and it does not matter whether the concurrence is joint or merely several.”

At p. 16, para. 5, he defines several concurrent tortfeasors thus:

“Several concurrent tortfeasors are independent tortfeasors whose acts concur to produce a single damage. The damnum is single, but each commits a separate injuria.”

He then gives several illustrations including the following:

“Another common illustration is where two motorists between them negligently injure a pedestrian or the passenger of one of them.”

The law is well settled and clear and I do not consider it necessary to quote the authorities which support the above propositions. I would merely refer in particular to *Dingle v. Associated Newspapers Ltd.* (9), [1961] 1 All E.R. 897 at p. 916, *Drinkwater v. Kimber* (10), [1952] 1 All E.R. 701 at p. 705 and *James Ngaya v. Beers* (11), [1961] E.A. 390 (C.A.).

I would accordingly dismiss the cross-appeal with costs. I would allow the appeal with costs and vary the judgment and decree of the Supreme Court by ordering that judgment be entered for the appellants against the first, second and third respondents jointly and severally in the sum of £4,825 and costs.

Counsel for the second and third respondents has not asked for an order for contribution against the first respondent as, indeed, he could not in the proceedings on the appeal.

**Sir Trevor Gould Ag V-P:** I have had the advantage of reading the judgment of the learned President. I agree with his reasoning and conclusions and there is nothing which I can usefully add.

**Newbold JA:** I have had the advantage of reading the judgment of the President. As respects the appeal, I agree entirely with what he has said on the liability of concurrent tortfeasors and, as respects the cross-appeal, I agree with what he has said on the quantum of damages, the admissibility of the statement of the second respondent and the apportionment of the negligence between the first and second respondents.

I wish, however, to refer briefly to the standard of care required of the second respondent in the circumstances of this case and to the failure of the second respondent to exercise the standard of care required of him.

As regards the standard of care which should have been exercised by the second respondent in the circumstances of this case, it is necessary to refer to the legislation applicable to the facts of the case. The Highway Code was prepared by the Minister under s. 68 (1) of the Traffic Ordinance (Cap. 403) “for the guidance of persons using roads”. Section 68 (3) provides that “A failure on the part of any person to observe any provision of the highway code . . . may in any proceedings (whether civil or criminal . . .) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings”. I construe this to mean that if one party fails to obey a provision of the highway code and as a result an accident ensues, this failure tends to show that he is guilty of negligence and that the other party is not. To my mind this is a statutory provision to the effect that a driver is entitled to

rely on the assumption that the provisions of the highway code will normally be obeyed by other drivers on a road. The highway code states that a “Yield” sign is one which must be observed; and that sign requires the driver to which it applies to give way to traffic on the major road. This means that by legislation the driver on the major road is entitled to the right of way. Thus if an accident occurs through a failure of the driver on a minor road to obey the “Yield” sign this tends to show that the driver on the major road. In my opinion the law of Kenya does not require the driver of a vehicle on the major road to approach a cross-roads at which, for the minor road, there is a “Halt” or “Yield” sign at a slow speed and with his foot on the brake ready to avoid hitting or being hit by a vehicle which has emerged improperly from the minor road. If this were so it would nullify all traffic signs, abolish the difference between major and minor roads, amount to a disregard of the provisions of the Traffic Ordinance and the subsidiary legislation made thereunder and cause a congestion of traffic, the elimination of which is one of the objects of that legislation. This does not mean that the driver on the major road can disregard the existence of the cross-roads: it is his duty to keep a proper look-out for all vehicles or pedestrians who are using or may come upon the road from any direction. If he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be.

As regards the failure of the second respondent to exercise the standard of care required of him in the circumstances of this case, the judge has accepted statements of the second respondent that he did not look to his left on entering the junction and that he first saw the scooter when it was 6ft. or 7ft. from the van; and the judge has found accordingly that the second respondent failed to keep a proper look-out and that this failure contributed to the accident. There are other facts in the case which lead me to the conclusion that I would not have accepted these statements as correct. I might well have come to the conclusion that the second respondent was keeping a proper look-out and that, short of approaching the cross-roads in a manner which in my view was not required of him, the accident could not have been avoided by the second respondent. There was, however, evidence before the judge upon which he could properly come to his finding and I do not think that his finding can be assailed on appeal in this case.

For these reasons I agree with the order proposed by the President.

*Appeal allowed. Cross-appeal dismissed.*

For the appellants:

*JEL Bryson and JHS Todd*

*Bryson & Todd, Mombasa*

The first respondent did not appear and was not represented.

For the second and third respondents:

*SC Gautama, KM Pandya and Ramnik Shah*

*KM Pandya, Mombasa*



[1963] 1 EA 253 (CAK)

**Division:** Court of Appeal at Kampala  
**Date of judgment:** 12 June 1963  
**Case Number:** 5/1963  
**Before:** Sir Trevor Gould Ag V-P, Crawshaw and Newbold JJA  
**Sourced by:** LawAfrica  
**Appeal from:** The High Court of Uganda – Jones, J

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*[1] Criminal law – Witness – Trial – Witness whose evidence essential to just decision – Judge’s duty to call – Charge of murder – Admission of stabbing by accused in statement to police – Statement inadmissible in evidence – Co-accused acquitted on submission of no case to answer – Co-accused not called as witness by defence – Whether co-accused should have been called as witness by judge – Criminal Procedure Code (Cap. 24), s. 148 (U.).*

**Editor’s Summary**

Two brothers, A and B, were accused of murder. When A was charged with the offence, he made a statement admitting the killing. At the trial when the prosecution sought to put in this statement as evidence, counsel for the accused objected and, after a trial within a trial, when it transpired that what purported to be a caution to the accused in fact read as translated “You are not allowed to say many words”, the judge refused to admit the statement. At the end of the case for the prosecution the judge held that there was no case for A to answer and acquitted him, but B was subsequently convicted. On appeal by B it was submitted on his behalf that although the statement by A was rightly excluded, it should have been considered in some way in favour of B. This proposition was rejected by the appellate court which, however, considered whether the judge should himself have called A as a witness under s. 148 of the Criminal Procedure Code.

**Held –**

- (i) the first part of s. 148 of the Criminal Procedure Code confers a discretion upon the court, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, the judge has a mandatory duty (if the witness has not been called) himself to call the person; the duty remains even if the evidence to be called supports the case for the prosecution and not that of the accused.
- (ii) since the prosecution case was already strong and the appellant was represented by counsel who knew of the statement it was impossible to say that the judge should have concluded that the evidence of the appellant’s brother was essential to a just decision of the case.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *R. v. Parks*, 46 Cr. App. R. 29; [1961] 3 All E.R. 633.

- (2) *Boniface s/o Muhindi v. R.*, [1957] E.A. 566 (C.A.).
- (3) *Manyaki d/o Nyaganya v. R.*, [1958] E.A. 495 (C.A.).
- (4) *R. v. Rowland*, 32 Cr. App. R. 29; [1947] K.B. 460.

### **Judgment**

**Sir Trevor Gould Ag V-P:** read the following judgment of the court: This is an appeal from the conviction of the appellant by the High Court of Uganda on a charge of murdering Alisandoro Otede on September 12,



1962, at Aparongo village in the Lango district. When the trial commenced one Ongom s/o Akona was arraigned with the appellant and both accused were represented by the same advocate. After a medical witness and another who identified the body of the deceased had been heard, the learned judge assigned another advocate to the appellant as he thought that the interests of the two accused might conflict. In his note he said:

“After reading the accuseds’ statements it appeared to me that perhaps it would be in the interest of the accused to be separately represented.”

The statements referred to can be assumed to be those made by each accused after charge and caution, which would in the normal course be with the depositions, though at a later stage of the trial in the High Court they were excluded from evidence by the judge.

For clarity I will hereafter refer to the appellant as Otim and to the original first accused as Ongom. The two were brothers. On the evening in question at Aparongo village there was a dance at the house of one Olinga and a beer party elsewhere in the vicinity. According to the evidence of Olinga both Otim and Ongom were at the dance – according to Otim’s unsworn statement they had earlier been at the beer party. Olinga said that the deceased was also at the dance. Otim became involved in a quarrel with Pule concerning the bicycle of the latter. Otim took the valves from the tyres and challenged Pule in these words: “If you are strong, follow me.” Shortly afterwards Otim said: “I want to fight the boys from Atik.” Olinga heard the explanation of this from Otim and it was that his brother Olura had been sent to prison after a fight, and the deceased had given evidence in the case. Deceased, and one Sabuloni Otede (who was not at the dance but to whom reference will later be made) came from Atik. After these events, Olinga said he chased the dancers away but shortly afterwards heard an alarm from the road about a hundred yards away. He found that the deceased and Sabuloni had been stabbed; according to the medical evidence the deceased died from a stab wound in the abdomen. Sabuloni survived.

Pule gave evidence that he went from the beer party to the dance and confirmed Olinga’s evidence concerning the quarrel over the bicycle and Otim’s challenge to himself. He said that he then started for home, saw the deceased running, pursued by Otim with Ongom following. He heard the deceased cry “Otim has stabbed me”. Then he heard Sabuloni cry “Ongom has stabbed me”. The two accused moved towards Pule with knives and he ran away. It was night and it is not clear whether the witness claims to have seen the blow struck; he was challenged in cross-examination with having said at the preliminary enquiry, that he saw Otim “box” the deceased. He agreed he had said so and it was true.

Sabuloni’s evidence is that he was returning home from the beer party in company with on Oding. When they were about thirty yards from Olinga’s house he saw people running and Otim chasing the deceased. When about two yards away the deceased dropped, Otim reached him and, as the witness then thought, “boxed” him. The deceased cried “Otim has stabbed me. He has killed me”. The witness held Otim but Ongom came running, said “Who is holding you?” and stabbed the witness.

Oding confirmed that he was returning with Sabuloni from the beer party. He saw the deceased running. At a distance of about two yards he saw Otim pushing the deceased and thought he was “boxing” him. The deceased cried “Otim has stabbed me”. Immediately afterwards Ongom stabbed Sabuloni and the witness ran away. He did not know the accused persons before that time but was clear that the stabbing was done by two different persons.

One Omodo testified that he was on his way to the dance at Olinga’s house when he heard an alarm raised by Sabuloni. He met the deceased running and

holding his stomach. He asked the deceased “Who has done you wrong?” and received the reply “Kulukana Otim has stabbed me. If my father and mother come, it is Kulukana Otim who has stabbed me”. We would add that that statement is admissible in evidence under s. 30 of the Evidence Ordinance (Cap. 9 of the Laws of Uganda, 1951).

There was thus very strong evidence indeed that Otim stabbed the deceased. There was, however, another witness named Ogwang who said he was a brother of the two accused. They had different mothers but the same father. He said that he was at the dance, and –

“I, Ogwang, Odongo and Otim (accused 2) went together. We found Ongom (accused 1) on the way. We had gone about half a mile. He was standing. I found him half naked. I asked him where his shirt was. He said that people had fought him and torn his shirt. He said he had been beaten on the head twice. He said he had been struggling for a knife. He had wounded two people, one short and one tall. He did not mention the name. Odong, Ogwang and Otim were with me when he said this.”

In his statement adopted as evidence at the preliminary enquiry, it appears from a passage in his cross-examination that he did not say Otim was with him. The learned judge’s note reads:

“That statement was adopted at the preliminary enquiry. This is the one.

“In that statement I said I rode home alone. In that statement I said Odong and Ogwang and Otim were with me, not only Odong and Ogwang. The police constable might have forgotten to write Otim.”

He was questioned by the court and replied:

“I was proceeding from Aparongo to my home. I found him in Aparongo village. I pushed my cycle from the beer party. There is only one road to Akali. I saw no dead body on the road. I saw no struggle and saw nobody stabbed. I took the route normally taken. That is the only road. That would have been the road taken by the accused.”

This evidence was discredited by the learned judge for reasons which are equally applicable to the unsworn statement of the appellant, which reads in part:

“I left the beer party at Ongom’s; on the way home I found people dancing. I branched off to the place where the people were dancing. Then people started shouting. I stood aside. I saw Ogwang running. He said people had fought him. I asked him why they had fought him. He said that someone had accused him of piercing his cycle. When I asked Ogwang this, I saw Ogwang and Odong coming. We went straight home.

“On the way home we found Ongom standing on the way. I asked him where his shirt was. He told them that people had beaten him and torn his shirt. He said someone had pulled out a knife. He snatched it from him and harmed two people. He showed me his right hand, head and chest. When he said this we were four – Ogwang, Odong, myself and Ongom.

“I went straight home after that. We went to bed.”

The learned judge’s view was summed up in the following passages of his judgment:

“According to them, neither Ogwang or Otim saw anything on the Aparongo-Akiki road when they went home. That means, if their evidence is correct, that Alisandoro was killed after they had passed or that the persons whom Ongom stabbed were stabbed at the party and could not be Alisandoro or Sabuloni.

“I do not believe Ogwang or Otim, as they must have seen Alisandoro’s body on the road. There was only one road and the body of Alisandoro was there from 8 p.m. when they were on it, until the following morning. Their evidence was a tissue of lies. The accused was unwilling to have it tested in cross-examination.

“The truth lies undoubtedly with the prosecution. I believe the evidence of P. 3, P. 4 and P. 5, who actually saw what happened, and I accept their evidence in its entirety. They had ample opportunity of seeing the man who did the deed, and in fact Sabuloni caught him. They also knew him very well. Added to that is the fact that Alisandoro told Omodo, as he was running away, that it was Otim who had stabbed him.

“ . . . . .

“The assessors believed, as I did, the evidence of P. 4, P. 5 and P. 6, and had no doubt that Otim stabbed Alisandoro Otede and did so with intent to kill. With that view I entirely agree.

“Otim had certainly been ‘trailing his coat’ all the evening, and appeared to be spoiling for a row or a fight. He went as far as to say at Olinga’s that he was going to fight boys from Atik. Otede, the deceased, came from Atik. Otim had a further reason for venting his wrath on Otede. Otede, the deceased, had given evidence against the accused’s brother Obura when he was given a term of imprisonment arising out of his conviction in that case.”

In the first of the two passages quoted, the learned judge probably intended to refer to witnesses 4, 5 and 6 who were Pule, Oding and Sabuloni; number 3 was Olinga who was not an eye-witness, though his evidence told strongly against the accused. There appears also to be a misdirection in the statement that P. 5 knew Otim very well, as in evidence he said the contrary. We do not think that is sufficient to invalidate the conviction. The assessors were satisfied, the evidence was very strong and the judge’s reasons for discrediting the story of the defence and the witness Ogwang were cogent. So far as the record of the trial and the evidence is concerned, there is no reason at all for this court to interfere with the conviction.

It is necessary, however, to consider a matter raised by counsel. Paragraph 4 of the memorandum of appeal reads:

- “4. The learned judge failed to appreciate that since there were two accused and accused one (1) who had admitted the killing but pleaded that he did not intend to kill was acquitted since his police statement could not be put in evidence, it is doubtful as to which of the two really killed deceased.”

For reasons which will appear, the learned judge held at the end of the prosecution case that Ongom had no case to answer. The prosecution had tendered in evidence a statement made by him upon being charged with murder. It was objected to by the advocate for Ongom and a trial within a trial was held. It transpired that what purported to be a caution administered prior to the making of the statement, when translated, read: “You are not allowed to say many words.” The learned judge in his discretion refused to admit the statement and there can be no quarrel with that decision. Counsel for the Crown did not then seek to resist a submission that Ongom had no case to answer, for there was nothing against him except the vague evidence of Ogwang, and he was accordingly acquitted.

The submission of counsel for Otim before this court was that Ongom’s statement contained an admission that he had stabbed “Otede” and another man. Counsel’s suggestion was that though the statement was rightly excluded

from evidence it should have been considered in some way in favour of Otim. This is, of course, an impossible suggestion. The statement could not be evidence in Otim's trial and his advocate in the High Court did not seek to make it so. If, after Ongom had been acquitted, he had been called as a witness the statement could conceivably have been put to him in cross-examination, and it is of course possible that he would have given evidence in accordance with the statement. On the other hand, he might perhaps validly have claimed privilege, for though he was no longer in jeopardy on the murder charge he was probably still liable to be charged with offences arising out of the stabbing of Sabuloni. All this is now a matter only of speculation, for the advocate for Otim did not see fit to call Ongom, though he must have been available. No application to this court has been made to call further evidence but any such application in relation to Ongom must have failed on the ground that the evidence was available at the trial. The principle that such evidence will not be allowed on appeal has been applied for many years and was repeated in the formulation of principles on this subject in *R. v. Parks* (1), 46 Cr. App. R. 29.

Having given the matter full and serious consideration, we think there is only one question to be determined by this court, and the fact that it was not propounded by counsel for the appellant does not render its consideration unnecessary. It is whether the learned judge was or was not in breach of his duty in not calling Ongom as a witness himself. The position in Uganda as to a judge's powers in that behalf is not the same as in England. Section 148 of the Criminal Procedure Code (so far as relevant) reads:

"Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:"

It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself. The duty remains even if the evidence to be called supports the case for the prosecution and not that of the accused: *Boniface s/o Muhindi v. R.* (2), [1957] E.A. 566 (C.A.); *Manyaki d/o Nyaganya v. R.* (3), [1958] E.A. 495 (C.A.). The duty of course arises only if the judge has come to the conclusion (as he had in *Manyaki v. R.* (3)) that the evidence is essential to the just decision of the case. In the present case the judge made no such finding. Is it open to this court to find that he ought to have done so? The learned judge had seen the statement, as is apparent from the passage quoted early in this judgment, when separate advocates were decided upon. In order to place ourselves as nearly as possible in the position of the judge, but not by way of evidence, we ourselves have looked at the statement and now reproduce it:

"I admit this offence. On September 12, 1962, at about 7 p.m. I left the beer party from Angom home. We were four people, I, Amlapero Ogwang, Odongo s/o Akona and Otim s/o Akona and went to Aparongo village, to watch the dance at Olingo s/o Omone. On our arrival there, I found many people gathering. I found Pule caught Ogwal, saying that, Pule took inflat tube bicycle. I asked Ogwal whether he did also, Ogwal denied about took off tube bicycle. I saw many people came against Ogwal. I separated them, one of them boxed Otim, fell down, and then one of them came and beat me on my head, I fell down. I had with a knife in my pocket. I took it and stabbed with Otede, he ran from me. I got up and ran away. On the

way running, I met with a man and then I stabbed him. I do not know his name. Otim, Ogwang and Odongo s/o Akona found me standing on the way. I told them that I stabbed two men, left them were unconscious. I do not know whether, died or not. I went home. On September 13, 1962, at about 1800 hours, Askaro of Aduku came and arrested me, took me to Akalo jail.

“This statement has been read back to me, it is true and correct.

R.T.M. Ongom s/o Akona.”

That follows generally what was said by Otim and Ogwang.

On full consideration we find it impossible to say that, in all the circumstances, the learned judge ought to have concluded that the evidence of Ongom was essential to the just decision of the case. It was not essential to the prosecution case which was already strong. So far as the case for Otim is concerned his advocate would have the advantage of being able to confer with his client and perhaps with Ongom, his brother, and the contents of the statement must have been available to him. There is no affidavit from the advocate as to his reason for not calling Ongom. The judge, by the end of the trial, would have formulated his opinion of the testimony of Ogwang and statement of Otim. He would assess the likely effect on his own mind of a similar statement by Ongom had it been forthcoming. He would have to weigh the possibility of any favourable effect of evidence by Ongom upon the assessors’ minds against the possibility that Ongom’s evidence might possibly be harmful in some measure to the defence. It would also be a matter for consideration that Otim, Ogwang and Ongom were closely related and had opportunity to confer before any arrest was made; also it would appear from Ongom’s statement that when he made it he did not know whether either or both of the two persons stabbed had died. The judge was entitled to consider the fact that Otim’s counsel made no attempt to call Ongom as a witness. We cannot say that there was a duty on the judge to do so.

In *R. v. Rowland* (4), 32 Cr. App. R. 29, the court of Criminal Appeal in England considered a case having some similar features. The appellant was convicted of murder and leave was sought to call as a witness a person, himself serving a sentence of imprisonment, who, allegedly, had confessed to the murder after the conviction of the appellant. The Court refused leave to call the witness.

In the result we find no legal ground for interfering with the conviction of the appellant and the appeal is dismissed.

*Appeal dismissed.*

For the appellant:

*JWR Kazzora*

*JWR Kazzora*, Kampala

For the respondent:

*H Hebron* (Crown Counsel, Uganda)

*The Director of Public Prosecutions*, Uganda

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 25 June 1963  
**Case Number:** 122/1963  
**Before:** Reide J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Charge – Breaking into building and committing felony – Particulars alleging that accused broke and entered a club – Proper offence to charge – Penal Code (Cap. 16), s. 265, s. 296 (1), s. 297, s. 298 (f) and s. 299 (1) (T.) – Criminal Procedure Code (Cap. 20), s. 186 and s. 192 (1) (a) (T.).*

### **Editor's Summary**

The two accused were charged of breaking into a building and committing a felony therein contrary to s. 296 (1) of the Penal Code and also of stealing contrary to s. 265 of the Penal Code. The particulars of the counts alleged that the accused broke and entered a club “with intent to commit a felony of stealing”, and that on the same day they stole a quantity of beer the property of the club. Both accused were convicted on both counts. In revision

### **Held –**

- (i) the accused should only have been charged on one count of breaking and entering a building and committing a felony therein contrary to s. 296 (1) of the Penal Code and the second count of theft was a surplusage.
- (ii) there is no such offence as “club breaking” under s. 296 (1) or s. 297 as the list of buildings set out in those two sections is unambiguous and exhaustive, and in those circumstances the marginal note cannot be prayed in aid to interpret or to extend the meaning of the wording of the sections.
- (iii) the accused were guilty of criminal trespass contrary to s. 299 (1) of the Penal Code and accordingly on the first count convictions under that section should be substituted.

Convictions under s. 299 (1) of the Penal Code substituted on the first count. Convictions under s. 265 affirmed.

### **No cases referred to in judgment**

### **Judgment**

**Reide J:** The two accused were charged on two counts: One, breaking into a building and committing a felony contrary to s. 296 (1) of the Penal Code, and two, stealing contrary to s. 265 of the Penal Code. The particulars of the first count alleged that the accused broke and entered the Gymkhana Club at Kigoma “with intent to commit a felony of stealing”, and the second count that on the same day they stole a quantity of beer the property of the Gymkhana Club. Both accused were convicted on both counts and sentenced to terms of imprisonment of eight months and one year respectively on the first count and four months and six months respectively on the second count, the sentences being ordered to run

concurrently.

There is a not uncommon confusion here between s. 296 (1) and s. 297, and magistrates will be well advised to examine carefully the wording of charges put before them under these sections. Section 296 (1) is the composite offence of breaking and entering into a building *and* committing a felony therein. Section 297 is the offence of breaking and entering *with the intention* of committing a felony therein. If in this case the charge had been correctly laid under s. 296 (1) (which, since the felony of theft was actually committed, would have been the most convenient course), then a second count of theft would have been surplusage. As it is, I shall treat the reference to s. 296 (1) as a curable error for s. 297.

I see that the magistrate quite properly had doubts whether s. 296 “covered a club breaking”, but he finally decided, incorrectly, incorrectly, that it did. It is well settled that, as Murphy, J., put the matter in a recent judgment,

“as can be seen by a perusal of s. 296 (1) and s. 297 of the Penal Code, there is no such offence as ‘club breaking’”.

The list of buildings set out in those two sections is unambiguous and exhaustive, and in those circumstances the marginal note cannot be prayed in aid to interpret or to extend the meaning of the wording of the section.

It now falls to be considered under what section, if any, a conviction should be substituted. I am satisfied that the provisions of s. 186 of the Criminal Procedure Code cannot be invoked: the club premises are not a “store” within the mischief of s. 296 or s. 297 merely because liquor is kept there for the consumption of the club members: and that while it seems likely that the premises were broken into during the night time the evidence is not clear enough on this point to warrant a substituted conviction under s. 298 (f). The accused is, however, guilty of the minor offence of criminal trespass contrary to s. 299 (1) of the Penal Code. In this connection I have considered whether it might be said that the “property upon which the offence is committed”, that is, the club premises, was a “building used. . . as a place for the custody of property”. If I were so to find, the maximum term of imprisonment which could be awarded under this section would be increased from three months to one year. I incline to think, however, that in the circumstances of this case so to find would be to place an unduly strained construction on the phrase “used. . . for the custody of”.

Accordingly I substitute convictions on the first count for criminal trespass contrary to s. 299 (1), and sentence each accused to three months’ imprisonment therefore. These terms will be served concurrently with the sentences on the second counts, which I shall not disturb.

I take this opportunity of drawing the magistrate’s attention to the following matters.

(1) The record of the witnesses’ evidence has not been signed by the magistrate as required by s. 192 (1) (a) of the Criminal Procedure Code.

(2) The rule concerning statements made by a *witness* and admitted as part of the *res gestae* has no application to the admissibility of evidence of relevant statements made by an accused person himself.

*Convictions under s. 299(1) of the Penal Code substituted on the first count. Convictions under s. 265 affirmed.*

## **Helena Yakobo v Tanganyika Contractors** [1963] 1 EA 261 (HCT)

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|--------------------------|------------------------------------|
| <b>Division:</b>         | High Court of Tanganyika at Arusha |
| <b>Date of judgment:</b> | 9 May 1963                         |
| <b>Case Number:</b>      | 4/1962                             |
| <b>Before:</b>           | Murphy J                           |
| <b>Sourced by:</b>       | LawAfrica                          |

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*[1] Practice – Pleading – Complaint alleging that vehicle negligently driven by servant – No averment that servant driving during course or within his employment – Whether complaint discloses cause of action.*

*[2] Practice – Pleading – Amendment – Pleading held by magistrate to be defective – Defect curable by amendment – Whether suit should be dismissed.*

### **Editor's Summary**

A plaintiff alleged that the respondents' motor vehicle was negligently driven by their servant or agent and as a result the appellant had suffered personal injuries. At the hearing a preliminary point was argued that the plaintiff disclosed no cause of action as it was not pleaded that the servant or agent was acting in the course or within the scope of his employment. The magistrate held that it was mandatory upon the appellant to aver in the plaintiff that the driver was acting in the course of his employment and dismissed the suit on the ground that no cause of action was disclosed. On appeal,

#### **Held –**

- (i) it was sufficient to plead that the driver was the servant of the defendant and whether the servant was or was not driving in the course of his employment was a fact peculiarly within the knowledge of the defendant to be pleaded by him in his defence.

*Commissioner of Transport v. Gohil*, [1959] E.A. 936 (T.), followed.

- (ii) the magistrate having found the plaintiff to be defective should have considered whether the defect was one which was curable by amendment.

Appeal allowed. Case remitted to the lower court for hearing.

### **Cases referred to in judgment:**

(1) *Commissioner of Transport v. Gohil*, [1959] E.A. 936 (T.).

(2) *Lake Motors Ltd. v. Overseas Motor Transport (T.) Ltd.*, [1959] E.A. 603 (T.).

### **Judgment**

**Murphy J:** This is an appeal from a decision of a resident magistrate in the Kilimanjaro district court dismissing a suit on the ground that the plaintiff disclosed no cause of action.

The plaintiff/appellant sued the respondent for damages arising from the alleged negligent driving of a motor vehicle. Paras. 3 and 4 of the plaintiff averred as follows:

- “3. The defendants were at the material time the owners of a motor vehicle registered No. AR. 7498.
- “4. On or about May 27, 1961, the defendants' servant or agent one Mr. Laurent Kileo, was driving the aforementioned vehicle on the Marangu-Himo road when the plaintiff stopped the driver of the said vehicle and the latter gave the plaintiff permission to climb into the said vehicle when the said driver suddenly and with a violent jerk and without having received any signal from the turn boy and without paying any regard to the safety

of the plaintiff started the said vehicle in consequence whereof the plaintiff sustained a fracture of her right thigh as a result of which the plaintiff suffered much pain and shock and has suffered loss and damage.”

Paragraph 4 of the defence averred that the plaint did not disclose a cause of action as it did not contain any averment that the respondents’ servant was acting in the course of or within the scope of his employment. Paragraph 6 (c) averred that if the respondents’ driver allowed the appellant to enter the vehicle (which was denied), this act was outside the scope of his employment and contrary to the respondents’ instructions that members of the public were not to be carried as passengers in the respondents’ vehicles.

When the case came on for hearing the question of whether the plaint disclosed a cause of action was argued as a preliminary point. The learned magistrate held that it was mandatory upon the appellant to aver in the plaint that the driver was acting in the course of his employment and he accordingly dismissed the suit on the ground that no cause of action was disclosed.

Unfortunately, the learned magistrate’s attention was not drawn to the case of *Commissioner of Transport v. Gohil* (1), [1959] E.A. 936 (T.). That was an appeal to the High Court of Tanganyika from a ruling by a magistrate that a plaint disclosed no cause of action for precisely the same reason as in the present case. It was held by Crawshaw, J., that it was sufficient to plead that the driver was the servant of the defendant and that whether the servant was or was not driving in the course of his employment was a fact peculiarly within the knowledge of the defendant to be pleaded by him in his defence.

Further, the learned magistrate having found the plaint to be defective should have considered whether the defect was one which was curable by amendment (see *Lake Motors Ltd. v. Overseas Motor Transport (T.) Ltd.* (2), [1959] E.A. 603 (T.)). Admittedly it does not appear from the record that any application was made to amend the plaint, although Mr. Mawalla, who appeared for the appellant in the lower court and at the hearing of this appeal, informs me that in the course of argument he adverted to the possibility of the alleged defect being cured by amendment.

For the respondent, Mr. Taylor submits that the present case is distinguishable from *Commissioner of Transport v. Gohil* (1) on the ground that the pleadings show that the respondents’ driver was not acting in the course of his employment. This submission, as I understand it, is based on the absence of any denial of the averment in para. 6 (c) of the defence, to which I have referred earlier, or of the averment in para. 3 that the vehicle was a five-ton goods vehicle. With respect, I do not think that the learned magistrate could properly have dismissed the suit on this ground without hearing evidence. It is unnecessary for a plaintiff to file a reply if he wishes only to deny the allegations contained in the defence, since if no reply is filed all material facts alleged in the defence are put in issue; see the notes in the Annual Practice, 1962, under O. 23 (at p. 561). It follows that there was no implied admission by the appellant that the respondents’ driver was not acting in the course of his employment.

Mr. Taylor also submits that the case is now *res judicata* because after the suit was dismissed the appellant filed another suit (Civil Case No. 444 of 1962 in the Kilimanjaro district court), claiming the same relief against the respondents, and this second suit was dismissed on the ground that it was time-barred. The learned magistrate held that the relevant period of limitation was one year. The suit from which this appeal emanates was filed less than a year after the accident referred to in the plaint. Again with respect, I cannot see that the learned magistrate’s ruling in the second suit on a question which has never been raised in the present case and which clearly could not successfully have been raised can debar the court from adjudicating upon issues which have not yet been decided.

The appeal must therefore be allowed. I do not feel disposed to award costs as *Commissioner of Transport v. Gohil* (1) was never referred to until the case reached this court and had the learned magistrate's attention been drawn to it, he could hardly have done other than reject the submission that no cause of action was disclosed.

The appeal is allowed, the ruling of the learned magistrate is set aside and the case is remitted to the lower court for hearing. I make no order as to the costs of this appeal. The costs so far incurred in the lower court are to be costs in the cause.

*Appeal allowed. Case remitted to the lower court for hearing.*

For the appellant:

*JRWS Mawalla*

*JRWS Mawalla, Moshi*

For the respondent:

*JC Taylor*

*Reid & Edmonds, Arusha*

## **National and Grindlays Bank Ltd v The Ngambo Estate and Saw Mills Ltd** [1963] 1 EA 263 (HCT)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 24 June 1963                              |
| <b>Case Number:</b>      | 145/1962                                  |
| <b>Before:</b>           | Biron J                                   |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Court – Fees – Action for specific performance – Performance of agreement to give mortgage – Valuation of subject matter of suit – Valuation for purposes of jurisdiction and court fees – Valuation stated in plaint as Shs. 380,000/ – Fees so assessed and paid – Application for refund of fees – Whether such application can be entertained and refund ordered – Indian Civil Procedure Rules, O. VII, r. 1 (a) – Court Fees Rules, r. 4, r. 7 and items 10 and 12 of First Schedule thereto (T.) – Indian Code of Civil Procedure, 1908, s. 151 – Court Fees, Fines and Deposit Rules, r. 7 (T.).*

### **Editor's Summary**

Under the terms of a debenture the defendant had deposited title deeds of a property by way of equitable mortgage as collateral security. The debenture also provided that the defendant should when called upon by the plaintiff so to do execute a legal mortgage of the property. The defendant having failed to execute

the legal mortgage when required, the plaintiff filed a suit claiming specific performance of the undertaking to execute the mortgage and an order that the defendant do execute such mortgage. For the purpose of jurisdiction and court fees, the plaintiff stated that the said property was of the value of Shs. 380,000/- and the court fees were assessed on that sum under item 10 in the First Schedule to the Court Fees Rules in the sum of Shs. 3,000/- and were paid. Subsequently the plaintiff submitted to the registrar of the High Court that the court fees were wrongly assessed and the deputy-registrar upheld the assessment of the fees as paid. From this ruling the plaintiff made an application under r. 7 of the Court Fees Rules and s. 151 of the Indian Code of Civil Procedure for an order that the fees be assessed and that if the fees charged were not in accordance with Court Fees Rules and that proper court fees be assessed and that if the fees charged were excessive then the amount paid in excess be refunded to the plaintiff. For the plaintiff it was contended that there was no amount involved in this case and that the fees were payable under item 12.

**Held –**

- (i) construing r. 7 of the Court Fees Rules in the light of the Indian authorities the court had jurisdiction to entertain the application and to order a refund of fees paid.
- (ii) the principles applicable to the valuation of suits for the purpose of jurisdiction were not necessarily applicable to the valuation for the assessment of court fees.
- (iii) the value of the relief sought was the value of the difference between an equitable and a legal mortgage and it would be impossible to give this a money value; accordingly the court fees should have been assessed under item 12 of the First Schedule to the Court Fees Rules.

Application allowed. Order that the excess in court fees paid be refunded.

**Cases referred to in judgment:**

- (1) *In the matter of Chaube Munna Lal* (1930), All. 546.
- (2) *Ahmed Ebrahim Vorajee v. The Government of the Province of Bombay* (1943), Bom. 25.
- (3) *Dawson-Miller C. J. v. Imam, J.* (1918), A.I.R. Pat. 496.
- (4) *U Po Toke v. U Lu Gyi* (1936), A.I.R. Rang. 352.
- (5) *Jaffers Ltd. v. Caltex (Africa) Ltd.*, [1961] E.A. 140 (C.A.).
- (6) *Mahadeo Ganesh Sohni v. Sadashiv and Another* (1925), A.I.R. Nag. 66.
- (7) *Biraja Charan Nanda v. Sailaja Charan Nanda* (1939), A.I.R. Cal. 155.

**Judgment**

**Biron J:** The plaintiff bank advanced to the defendant company in its current account with the bank sums of money totalling Shs. 500,000/-on the security of a debenture executed by the company in favour of the bank. Clause (2) of the debenture, and I quote from the plaint, provided that –

“... the defendant shall deposit the title deeds of all immovable properties then vested in and thereafter acquired by the company by way of equitable mortgage as collateral security”.

The said clause also provided that the defendant should

“at his own expense whenever called upon by the plaintiff so to do execute legal mortgages or charges as the case may require in favour of the bank over any such immovable properties”.

Pursuant to cl. (2) of the debenture the company duly deposited with the bank the title deeds of a piece of land. Subsequently the bank gave notice to the company requiring the company to execute and deliver to the bank a mortgage on the said land. The company failed to comply with the request and the bank accordingly brought a suit for specific performance of the agreement as to the execution of the mortgage and praying for an order that the company execute such legal mortgage in accordance with the debenture. No defence was filed and the plaintiff bank in due course obtained *ex parte* judgment and an order that the defendant company execute a legal mortgage in respect of the land. A decree to that effect issued and the order of the court has in fact been complied with.

As required by O. VII, r. 1 (a) of the Indian Civil Procedure Rules in respect of the valuation of the

subject matter of the suit for the purposes of jurisdiction and of court fees, the plaintiff bank stated in para. 10 of the plaint:

“The said piece of land is situate in Tanganyika and the value thereof is Shs. 380,000/-. The defendant is registered and carries on business in

Tanganyika and the agreement was made and was to be performed in Tanganyika hence this honourable court has jurisdiction to entertain this suit.”

Court fees on the plaint were assessed and paid in the sum of Shs. 3,000/-. As a result of the defendant company querying the amount of court fees, the plaintiff bank made representations to the registrar of the High Court to the effect that the fees were wrongly assessed. The deputy-registrar, by letter addressed to the plaintiff bank’s advocates, upheld the fees as paid, ruling that they had been properly assessed. It is from this ruling or decision that this application has been brought, asserting and praying:

- “1. That the court fees assessed and charged on the plaint filed herein is not in accordance with the Tanganyika Rules of [Court fees] and that the deputy-registrar’s ruling herein dated March 29, 1963, be reversed.
- “2. That the proper court fees on the plaint be assessed and in the event, it being held that the court fees charged are excessive then the amount paid in excess be refunded to the plaintiff.”

The first point for consideration is whether the court has jurisdiction to entertain the application and whether in the event it has power to order a refund of any excess paid.

I pause to note that before the application came up for hearing, subscribing in general to the principle of audi alteram partem and in particular welcoming assistance on a point apparently not covered by any East African authority, I called attention to the desirability of the appropriate government authority being represented at the hearing. The learned deputy-registrar, however, intimated that it was not considered necessary or desirable to have any representation and the hearing of the application accordingly proceeded *ex parte*.

The application as filed expresses itself as brought under r. 4 and r. 7 of the Court Fees Rules and s. 151 of the Indian Code of Civil Procedure. At the hearing Mr. Gandhi, who appeared for the applicant bank, conceded that r. 4 was irrelevant and should be disregarded. Rule 7 reads:

“The fees specified under special heads in Schedule I hereto annexed shall be leviable in respect of the several matters and proceedings mentioned therein and the fees specified under the heading ‘Miscellaneous’ shall be leviable in respect of all matters and proceedings to which they are capable of application; and all fees in Schedule I shall be leviable, as far as may be, in all proceedings in cases at present pending.”

Section 151 of the Indian Code of Civil Procedure is declaratory of the inherent powers of the court

“to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

The Rules themselves are silent as to any proceedings such as this instant application. No East African case to the point has been cited, nor am I aware of any, but there are relevant Indian cases. In *The Matter of Chaube Munna Lal* (1) (1930)), All. 546, it was held:

“Under s. 151 of the Civil Procedure Code the subordinate courts have power to issue certificates directing the refund of court fees paid in excess by inadvertence.”

It is pertinent to quote from the judgment (at p. 547):

“The question is whether the civil court should resort to its inherent power under s. 151, Civil Procedure Code, treating this as an order necessary

for the ends of justice. We consider that the applicant ought in justice to receive the Rs. 10 excess which he has paid by inadvertence. If the applicant had paid too small an amount, the court would have recovered the necessary deficiency from him.”

In *Ahmed Ebrahim Vorajee v. The Government of the Province of Bombay* (2) (1943), Bom. 25, it was held (quoting the relevant part of the headnote):

“... that appellant was entitled to refund of court fees under s. 151 of the Civil Procedure Code, irrespective of his prayer for revocation and the lower court was wrong in not exercising the jurisdiction vested in it under s. 151 of the Civil Procedure Code and refusing to direct a refund of the court fees paid.”

Also in *Dawson-Miller C. J .v. Imam J.* (3) (1918), A.I.R. Pat. 496, it was held (again quoting the headnote):

“Under s. 151, Civil Procedure Code, courts have inherent power to pass orders refunding court fees paid by mistake.”

But in *U Po Toke v. U Lu Gyi* (4) (1936), A.I.R. Rang. 352, it was held, and I quote from the judgment of Mackney, J. (at p. 353):

“It is to be noted that the district court cannot issue an order of refund of the court fees. Recovery of the excess amount paid is a matter between the appellant and the revenue authorities. All that the court can do is to certify that in its opinion the amount paid by the appellant was in excess of the amount required by law. Armed with this certificate the appellant may go before the revenue authorities and claim a refund from them. I have examined the provisions of the Court Fees Act and cannot find therein any authority given to the court to order a refund in such a case as the present. This appears to be the view taken by the Calcutta High Court in 40 Cal. 365 (1) where the appellant’s agent having inadvertently over-paid court fee on the memorandum of appeal the High Court directed the taxing officer to issue the necessary certificate to enable the appellant to obtain a refund of the excess court fee from the revenue authorities, and again in 1918 P.H.C.C. 273 (2) the taxing officer was similarly directed to issue the necessary certificate to enable the appellant to apply to the revenue authorities to obtain a refund of the amount of excess court fee, the court considering that under s. 151, Civil Procedure Code, it had inherent power to direct the issue of such a certificate. However this certificate is merely the expression of opinion of the court for which executive orders of the Government of Burma to which I have already referred, require to be obtained where any person desires to make an application to the revenue authorities for refund of court fee paid in excess.”

However, by r. 7 of the Court Fees, Fines and Deposit Rules –

“No fee or fine shall be returned except upon a voucher payable at the Treasury, in favour of the party entitled to receive the same, signed by the registrar of the High Court or by the judge or magistrate of the court to which the fee was paid.”

Construing this rule in the light of the Indian authorities, I am satisfied that the court has jurisdiction to entertain this application and power to order a refund of fees paid.

The deputy-registrar’s ruling is to the effect that the fees fell to be assessed under item 10 in the First Schedule to the Court Fees Rules, which reads:



“In all suits unless otherwise specified where the amount involved is:

|   | Shs.<br>cts  |
|---|--|
| Not exceeding 20 Shillings .....                              | 1.00   |
| Not exceeding 100 shillings.....                              | 2.00   |
| Exceeding 100 shillings and not exceeding 200 shillings ..... | 4.00   |
| Exceeding 200 shillings .....                                 | An additional fee of 4 shillings for every 200 shillings or part thereof up to 2,00 shillings and additional fee of 2 shillings for every 200 shillings in excess of 2,000 shillings. The whole fee levied not to exceed 2,000 shillings.” |

To this is added the 50 per cent. increase as provided for in r. 11 (as amended).

Mr. Gandhi contends that there was no amount involved in this case and he submits that the fees payable come under item 12, that –

Shs.cts

“In every suit where it is impossible to estimate the subject matter at a money value, and with regard to which no special fee is prescribed, unless in any class 20.00 of cases the judge otherwise orders .....

Provided that in every case where by reason of any finding or order of the court a declaration of ownership of any money or property is made, an ad valorem fee at the same rate as in fee 10 shall at once become payable, less the fee already paid.”

The proviso does not apply here.

In his ruling the learned deputy-registrar stated:

“I have given very careful consideration to the assessment of the court fees and have come to the conclusion that the fees charged were proper.

“In my opinion this was not a case where it could be held that it was impossible to determine the value of the subject matter of the suit.

“Under s. 4 of the Suits Valuation Act of India, the value of a suit is the value of the plaintiff’s interest in the litigation. Although the Act has no application in this country, I can find no better way for assessing the value of a suit for the purpose of court fees than to base such assessment on the value of the plaintiff’s interest therein. In *N. Narayanan Singh v. Alyasami Raddi* (1916), 39 I.L.R. 602, it was held that where a prayer in a plaint is for a declaration that a judgment debtor has no interest in a property attached in execution of a decree, the value of the suit is the value of the entire property. The same principle was applied in *Daw Datt v. Daw Kwi* (1932), A.I.R. Rang. 20.

“In the case under consideration the plaintiff company was seeking specific performance of an agreement to execute a legal mortgage of the property. Applying the principle in the two cases cited above, the value of the

suit must be deemed to be the value of the mortgage. However, as the value of the mortgage was greater than the value of the security, the court fees were properly charged on the value of the security which was given in the plaint as Shs. 380,000/-.”

Mr. Gandhi submits that these cases are not to the point as they are concerned with jurisdiction and not with court fees. Even if they were relevant, they lay down no more than that the criterion for valuation is the value of the plaintiff’s claim in the suit. Thus, in the first case cited the headnote reads:

“Where the prayer of the plaint is not only to cancel an attachment but also for a declaration that the judgment debtor has no interest in the

property, the value of the suit is the value of the entire property claimed by the plaintiff.”

And in the second case the headnote reads:

“Where a person, whose claim for removal of attachment of the property is dismissed, files a suit against the attaching creditor as well as against the judgment-debtors for a declaration that he is the owner of the property with respect to which his claim is dismissed then if the value of the property attached is more than the value of the decree obtained by the attaching decree-holder, the value which governs the jurisdiction of the court to deal with the suit is the value of the property itself and not merely the value of the decree. Since if the claimant is unsuccessful in his suit for declaration not only will the attaching decree-holder realize the value of decree but as regards any surplus remaining that will go to the judgment-debtors and the claimant will lose the whole value of the property sought to be attached.”

With respect, I fail to see how “applying the principle in the two cases cited above, the value of the suit must be deemed to be the value of the mortgage”.

The plaintiff bank already held the title deeds of the property concerned. That is, it held an equitable mortgage over the property. All the bank was claiming in the suit was the execution of a legal mortgage in respect of the same property.

The issue, to my mind, falls to be decided on the construction or meaning of “subject matter” in item 12.

This expression was considered and ruled on, though in a different context, by the Court of Appeal for Eastern Africa in *Jaffers Ltd. v. Caltex (Africa) Ltd.* (5), [1961] E.A. 140 (C.A.). In that case, and I quote from the headnote:

“The plaintiff agreed to lease certain premises to the defendant for a term of eighteen months and thereafter from month to month. One of the conditions of the tenancy was that the defendant was required to dispose of certain specified quantities of motor spirit and petroleum products through the premises during the first year of the term. The plaintiff alleged that the defendant had not complied with this condition and gave notice of forfeiture. The plaintiff then sued in the Moshi district court for possession and mesne profits and averred in the plaint that the value of the possession and mesne profits was less than Shs. 15,000/- which would confer upon the district court jurisdiction under the Subordinate Courts Ordinance. The magistrate upheld a preliminary objection that the value exceeded Shs. 15,000/- and rejected the plaint. On a first appeal the High Court held that the basis of valuation for the purpose of jurisdiction was the equivalent of twelve months’ rent which he held to be Shs. 11,700/- and he also held that neither the claim for mesne profits nor for damages brought the value of the suit to a sum in excess of Shs. 15,000/-. On further appeal

“Held:

- (i) the value to be considered is the value of that which the plaintiff seeks to recover and not that which the tenant may lose.
- “(ii) the plaintiff sought to recover possession of his premises in perpetuity and since the rental value of the premises was Shs. 975/- per month, the valuation of the property must amount to more than Shs. 15,000/-.”

The passage in the Schedule to the Subordinate Courts Ordinance (Cap. 3) in which the expression appears, as quoted in the judgment, reads:

“In suits and proceedings of a civil nature, in which the subject matter in dispute is capable of being estimated at a money value, the ordinary

jurisdiction of the district courts specified in the first column hereunder shall be limited to suits and proceedings in which the subject matter does not exceed the amount or value specified respectively in the second column hereunder:

| First Column   |  | Second Column                |
|--|--|------------------------------|
| A district court, when presided over by a resident magistrate. |  | Fifteen thousand shillings.” |

The decision is therefore authority for the proposition that although the claim was only in respect of possession, that is, a right or incident in the property, the valuation is based on the value of the property itself. However, that case is concerned with valuation for the purposes of jurisdiction. It is therefore no authority for the proposition that the same principles apply in the valuation for the purposes of assessing court fees. In fact, the case is very good authority for the proposition that unless there is some statutory provision to the contrary, valuation for the assessment of court fees is entirely different from, and cannot be equated to, valuation for the purposes of jurisdiction. The case, which was in respect of a claim for possession of property, laid down that the value of the property is the criterion. The Rules themselves lay down in item 13 of the Schedule, that –

|  |   |
|--|---|
| “In a suit by a landlord against a tenant for recovery of possession ..... |   |
|  | An ad valorem fee of 5 per cent. on the yearly rental of the property (in addition to the fee leviable for recovery of rent if any claimed, under fee 10).” |

It is not without interest to quote from a passage in the judgment of Gould, J.A. (at p. 144):

“The view of Law, J., that a valuation of twelve months’ rent should be adopted in all cases, appears, so far as I can ascertain, to be unsupported by authority, convenient though such a method might be. He referred to the Indian practice, but that is one which has been laid down by legislative enactment. By virtue of s. 7 (xi) (cc) of the Court Fees Act, 1870 (which was inserted by the Court Fees (Amendment) Act, 1905) in a suit by a landlord for the recovery of immovable property from a tenant (including a tenant holding over) the court fee is to be computed –

‘according to the amount of the rent . . . payable for the year next before the date of presenting the plaint’.

Section 8 of the Suits Valuation Act, 1887, provides that in suits in which court fees are payable ad valorem under the Court Fees Act, 1870 (with certain exemptions)

‘the value as determinable for the computation of court fees and the value for the purposes of jurisdiction shall be the same’.

The decision in the case referred to by Law, J., in his judgment, *Ram Chand v. Ram Dass* (1910), 5 I.C. 510, which is only available in Dar-es-Salaam in digest form (Desai’s All India Century Civil Digest, 1811–1912, Vol. XL, p. 424) appears merely to embody the statute law which I have set out. It was not claimed that there is any equivalent legislation in Tanganyika, and in its absence, there appears to be no valid reason for saying that because an arbitrary value is placed by Rules of Court upon certain suits for the purposes of payment of court fees, that value should replace the real value which ought to determine the jurisdiction of a court.”

The converse is, I think, also true, that in the absence of any statutory authority there is no valid reason why, if a certain valuation is adopted for the purposes of jurisdiction, a like valuation should be adopted in the assessment of court fees. Further, “subject matter” in item 12 must be read together with “the amount involved” in item 10. What was involved in this instant case was the execution of a legal mortgage.

Support for the general proposition that the principles applicable in the valuation of suits for the purposes of jurisdiction cannot be applied to the valuation for the assessment of court fees, is to be found in two Indian cases which are of particular assistance to this instant case. The first is *Mahadeo Ganesh Sohni v. Sadashiv and Another* (6) (1925), A.I.R. Nag. 66, the headnote to which reads:

“A suit wherein the relief claimed is the cancellation of a mortgage decree which leaves the defendant with the right and the opportunity to obtain another similar decree on the same mortgage in a properly framed suit is a suit, the value of the subject matter of which is not capable of ascertainment and it falls within art. 17 (6) of the Schedule II to the Court Fees Act.”

In the judgment it is stated:

“The relief asked is the cancellation of a decree obtained on a mortgage and the principles set out in *Devidas v. Ramlal* would apply if cancellation of the decree meant practically cancellation of the mortgage, but it does not. Cancellation of the decree here leaves the defendants with the right and the opportunity to obtain another similar decree on the same mortgage in another properly framed suit. The value of the claim is, therefore, the value of the decree, which can easily be ascertained, *minus* the value of the chance the defendants have of obtaining another decree on the same mortgage, which cannot possibly be ascertained. The value of the claim cannot, therefore, be ascertained, being the difference between two quantities of which one is unknown.”

The other case is *Biraja Charan Nanda v. Sailaja Charan Nanda* (7) (1939), A.I.R. Cal. 155, where it was laid down (quoting from the headnote):

“In order to ascertain the exact nature of a relief claimed in a suit, the benefit to the plaintiff should be considered. It is wrong to look to the consequences of the relief rather than to the relief itself.

“Plaintiff’s father created a trust in respect of some properties, but before he could make any definite arrangement, he died. Subsequently the plaintiff and his brother came to terms and executed an agreement by which it was stipulated that the parties should join in executing a deed of trust for the benefit of the charitable institutions. The opposite party having failed to comply with the agreement, the plaintiff brought a suit for a declaration that the properties specified in the family agreement were dedicated to the charitable institutions mentioned therein or in the alternative for a decree for specific performance against the defendant directing him to execute and register the deed of trust jointly with the plaintiff.

“Held: that it was clearly a claim for specific performance of a contract for executing a deed of trust and fell under Schedule 2, art. 17 (vi), Court Fees Act. The plaintiff did not seek a change in the character of ownership and it was not possible to estimate the money value of the subject matter in dispute.”

In his judgment S. K. Ghose, J., stated (at p. 157):

“But we have still to consider whether it is not possible to estimate this claim of specific performance at a money value.

“ . . . . .

“Similarly (p. 158) as Mr. Chakravarty for the petitioner has pointed out, a suit for the registration of a document amounts to nothing more than a suit to complete a title by execution of a deed of gift and it has been held to come under Schedule 2, art. 17, cl. (vi): 39 C.L.J. 40. These principles it seems to me are applicable to the present case. As I have stated repeatedly, prayer (kha) amounts to the claim for specific performance; but there is no consideration mentioned, and the value of the property cannot be taken to be the value of the relief. It must be held therefore that it is not possible to estimate the money value of the subject matter in dispute.”

The plaintiff bank’s claim was for specific performance of the agreement to execute a legal mortgage on the property over which it already held an equitable mortgage. That is the subject matter of the suit. The value of the relief sought – the subject matter of the suit – is thus the value of the difference between an equitable and a legal mortgage. It will not, I think, be disputed that it is impossible to estimate this subject matter at a money value. It is not suggested that any special fee is prescribed in such case as the present. I therefore uphold the submission of Mr. Gandhi that the fees in this case fell to be assessed under item 12 of the First Schedule to the Court Fees Rules.

As already indicated, I consider that the court has power to order a refund of court fees paid in excess. Accordingly, I grant the application as prayed and order that the excess in court fees paid over and above the fee set out in item 12 in the Schedule to the Court Fees Rules, be refunded to the applicant plaintiff.

*Application allowed. Order that the excess in court fees paid be refunded.*

For the plaintiff/applicant:

*RG Gandhi*

*Atkinson, Walker & Co, Dar-es-Salaam*

## **The Motor Union Insurance Co Ltd v AK Ddamba** [1963] 1 EA 271 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 29 March 1963                   |
| <b>Case Number:</b>      | 385/1962                        |
| <b>Before:</b>           | Jones J                         |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Insurance – Motor insurance – Action for declaration that insurance company entitled to avoid policy – Allegations of non-disclosure and misrepresentation by insured – Accident – No action filed*

*against insured by third party – Whether action for declaration competent – Traffic Ordinance, 1951, s. 104 (4) (U.).*

*[2] Insurance – Proposal – Disclosure of material facts – Proposal form filled in by agent of insurance company – Full disclosure to agent alleged – Whether disclosure of facts to agent can be imputed to insurance company.*

### **Editor's Summary**

The plaintiff, an insurance company, filed a suit against the defendant insured, under s. 104 (4) of the Traffic Ordinance, 1951, for a declaration that the company was entitled to avoid a motor insurance policy issued to him on the grounds that the same was obtained by non-disclosure of material facts and/or by representation

of facts which were false in some particulars. For the defendant it was contended that the proceedings were incompetent until a judgment has been given in a case brought against the defendant as a result of which the defendant could claim to be indemnified under the policy of insurance. It was common ground that no action had been started against the defendant under the policy. The proposal form had been filled in by the plaintiff's agent and it was alleged that full and accurate disclosures were made orally to him by the defendant.

**Held –**

- (i) the proviso to sub-s. (4) of s. 104 of the Traffic Ordinance, 1951, was not applicable as no action had been started against the defendant under the policy.
- (ii) the action was competent.
- (iii) the defendant's evidence was not truthful.
- (iv) the plaintiff company's agent had no information other than that disclosed on the proposal form, but even if he had, that information could not be imputed to the plaintiff company.

Declaration granted as prayed.

**Cases referred to in judgment:**

(1) *Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.*, [1929] All E.R. Rep. 442; [1929] 2 K.B. 356.

(2) *Bhagat Ram s/o Guran Ditta v. Eagle Star and British Dominions Insurance Co. Ltd.* (1933), 15 K.L.R. 77.

**Judgment**

**Jones J:** This was an action by the plaintiff company for a declaration that they were entitled to avoid a motor insurance policy No. 360362 issued to the defendant on January 5, 1962, on the grounds that the policy of insurance was obtained by non-disclosure of material facts and/or by representation of facts which were false in some particulars.

I should perhaps deal with a preliminary point which Mr. Pandit raised. Mr. Van Tijn, in his opening, said the proceedings were instituted to protect the insurers as provided by s. 104 (4) of the Traffic Ordinance. Pandit argued that the proceedings are incompetent until a judgment has been given in a case brought against the defendant as a result of which the defendant could claim to be indemnified under the policy of insurance. He could not produce any authority, but relied on the ordinary meanings of the words in the section.

The section seems perfectly clear to me. If an insured person is involved in an accident with another person, he may be sued by that other person. If the suit is successful, then in the normal course of events the insurance company would be bound to pay under the existing policy of insurance with the insured.

This section, i.e. 104 (4) of the Traffic Ordinance, was designed to protect the insurance company if they bring an action either (a) before an action is started against the insured; or (b) within three months after it has been commenced; for a declaration that they are entitled to avoid the contract subsisting



between them as there has been non-disclosure of a material fact or that there has been a representation of fact which was false in some material particular.

Once the insurance company has obtained such a declaration, they can produce such a declaration in any subsequent action taken under the policy against the insured and deny liability therefore.

No action has yet in fact been started against the defendant under this policy, so the proviso in sub-s. (4) of s. 104 of the Traffic Ordinance is not applicable.

I have no doubt this action is competent, and I so rule.

The following facts are not denied by the defendant:

On January 7, 1958, he had an insurance policy with Sterling General Assurance Company Limited in respect of a Simca car. That car was involved in two accidents involving claims; two discharge receipts in respect of the claims were signed by the defendant (Ex. 6 and Ex. 7).

On August 6, 1960, he took out an insurance policy with the Indian Trade and General Insurance Co. Ltd. in respect of a Ford Taunus saloon.

On December 22, 1961, he signed a proposal and declaration for an insurance policy in respect of the same car with the Motor Union Insurance Company. A policy was issued on the strength of the proposal form on January 5, 1962.

On March 9, 1962, at mile 3 on the Entebbe road Mr. Ddamba was involved in an accident with another vehicle. He put in a claim to the plaintiff company on the following day.

Something in the claim form put the plaintiff company on enquiry, and they instructed their advocates, Messrs. Russell & Co., to investigate. Mr. Ddamba was interviewed by Mr. Van Tijn of Russell & Co. He volunteered a statement (Ex. 8) in which he admitted that his driver had been involved in an accident in the Simca in 1958.

As soon as the plaintiffs knew of the claims history with Sterling Insurance Company, they sent a letter by registered post disclaiming liability to Ddamba (Ex. 3). It was returned unopened.

The plaintiffs claimed that in answer to the question in box 10 on the proposal form (Ex. 1) signed by him on December 22, 1961, he did not declare a material particular. Question 10 reads:

“Are you now or have you been insured in respect of any motor vehicle? If so, please state name of company or underwriter.”

“Answer – “Yes. Indian Trade and General Insurance Co. Ltd.”

The answer should have read, according to the plaintiffs:

“Yes. With the Sterling General in respect of my Simca, and the Indian Trade and General Insurance Co. Ltd.”

Further, in answer to the question 11 (b) –

“If so, for how many years up to this date have you previously been insured continuously without claim and with which companies?”

the proposal form reads:

“4. Companies as above”,

which the plaintiffs say is false, having regard to the statement made by the defendant to Russell & Co., the discharge certificates Exs. 6 and 7 and the evidence of Mankikar (P. 3), resident manager of Sterling General Insurance Co. They also complain that the answers to questions 12 and 14 are untrue.

The defence was that a man called Kamya

(1) purported to be the agent of the insurance company;

- (2) told Ddamba that all he had to do was to answer questions in Luganda and that all he, the defendant, had to do was sign the completed form;

- (3) that he, Kamya, said that he would only record that which was really necessary;
- (4) that the defendant signed the form blindly, placing implicit faith in Kamya;
- (5) that full and accurate disclosures were made orally to Kamya, who was the agent of the plaintiff company.

It is admitted that the proposal form Ex. 1 was signed in Ddamba's house during lunch time on December 22, 1961. Wampamba (P. 1) and Kamya (P. 4) said in evidence that Ddamba asked P. 4 to fill in the form as he was about to have lunch. That sounds very natural and probable. Ddamba denied this, saying that Kamya wanted to assist him and volunteered to do so.

Kamya denied that Ddamba had told him of his two previous accidents, or that his previous insurers had asked him to pay the first £5 on any claim. Ddamba's advocate urged that as he had declared the matters quite voluntarily to Messrs. Russell & Co. in Ex. 8 after the accident on March 9, 1962, one ought to deduce that it was probable that he had mentioned it to Kamya on December 22, 1961.

Thirdly, P. 1 and P. 4 said Ddamba read Ex. 1 through before signing it.

Who, of the witnesses, is speaking the truth? Wampamba and Kamya were unshaken in cross-examination. Ddamba, on the contrary, appeared harassed under cross-examination and tried to fob off everything by saying that all this happened because everything was done in a hurry during lunch time. Apart from his demeanour, I am satisfied that Mr. Ddamba has not been speaking the truth as to what happened on December 22, 1961, for the following reasons:

He told Mr. Van Tijn that he had never completed a proposal form in his life, only signed one. Later on in his cross-examination he had to admit that he had filled the one he took out with the Indian Trade and General Insurance Co. Ltd.

Secondly, far from making a clean breast of things to Van Tijn in Ex. 8, he omits to mention the second claim arising out of an accident in October, 1958. The first was one in which his driver was involved, which he harped on, but seemed singularly anxious not to refer to the one in which he was involved.

I find, from the evidence before me, that –

- (1) Ddamba asked Kamya to fill in the proposal form.
- (2) Kamya filled in exactly what Ddamba told him.
- (3) Ddamba did not disclose that he had been insured with the Sterling General or that he had been involved in any accidents during the previous four years or that there were conditions on his policy.
- (4) He read the proposal form before he signed it. He is an intelligent man and knew the importance of speaking the truth. This was in fact the third proposal he had made within three years.

I also accept Fliess' (P. 2's) evidence that if he had known of Ddamba's previous claims history, he would have had to reconsider his position and either –

- (1) refuse to accept the risk; or
- (2) impose a possible £50 compulsory excess without a reduction in premium; or
- (3) refuse a 40 per cent. no-claim bonus.

In *Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.* (1), [1929] All E.R. Rep. 442, Lord Scrutton said at p. 444:

“The contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk.”

Had the proposer disclosed all the relevant and material information in the proposal form, the plaintiff company might very well have taken a different attitude to this risk.

It was claimed by the defendant that Kamya was the insurer’s agent and therefore any knowledge he had was imputed to the company. I have decided that Kamya had no information other than that disclosed on the proposal form, but even if he had, the insurers would not be liable on the authority of *Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.* (1).

“A proposal form was handed by the agent of an insurance company to a partner in the plaintiff firm who was minded to insure a motor omnibus, the property of the partnership, against damage by accident and third-party risks. In answer to three of the questions set out in the proposal form the partner gave the correct answers orally to the agent, but the agent wrote those answers on the form incorrectly, either because he had misunderstood or forgotten what the partner had told him or intentionally to earn a commission which otherwise he might not receive. The partner then signed the form, which contained a warranty that the answers were true and a statement that the warranty was promissory and should be the basis of the contract between insurers and assured. The company issued a policy and accepted a premium. An accident having occurred, the plaintiffs claimed to be indemnified under their policy, but the company repudiated the claim on the ground that the written proposal contained untrue statements.

“Held: the agent was not authorised by the company to fill in the proposal form and in doing so must be regarded as the agent of the proposer, and knowledge of the agent that the answers to certain questions in the form were not true was not notice to the company; the written contract alone could be looked at to ascertain the terms of the agreement between the parties; and, therefore, the company was not liable to meet the plaintiff’s claim.

“Per Greer, L.J.: The acceptance of the premium cannot be regarded as an agreement to vary the contract by inserting in it a promise to indemnify the assured if the statements contained in the proposal form are untrue, nor can the company be said to be estopped by the receipt of the premium from relying on the contract under which the premium was paid.”

In that case, it was held that the agent of the insurers was acting as an amanuensis of the proposer in the completion of the form, and that his knowledge of the true facts could not in such circumstances be imputed to the insurers. The proposal, accompanied by the signed warranty, was the basis of the contract in this case.

The decision in *Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.* (1) was followed in *Bhagat Ram s/o Guran Ditta v. Eagle Star and British Dominions Insurance Co. Ltd* (2) (1933), 15 K.L.R. 77.

Whether Ddamba’s version of what happened on December 22, 1961, is accepted, or Kamya’s, on the authorities cited above the plaintiffs are entitled to the declaration they seek under para. 10 of their plaint, i.e. a declaration that they are and have at all material times been entitled to avoid the policy of insurance No. 360362 dated January 5, 1962, apart from any provisions contained therein on the ground that the said policy of insurance was obtained

by the non-disclosure of material facts and/or by representation of facts which were false in some material particular.

I give them their declaration and the costs of this suit.

*Declaration granted as prayed.*

For the plaintiff:

*Van Tijn*

*Russell & Company, Kampala*

For the defendant:

*SV Pandit*

*SV Pandit, Kampala*

**The United Marketing Company v Hasham Kara**  
[1963] 1 EA 276 (PC)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Privy Council   |
| <b>Date of judgment:</b> | 8 April 1963  |
| <b>Case Number:</b>      | 11/1961   |
| <b>Before:</b>           | Lord Evershed, Lord Hodson and Sir Terence Donovan  |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | E.A.C.A. Civil Appeal No. 56 of 1959 on Appeal from H.M.<br>Supreme Court of Kenya – Templeton, J |

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*[1] Contract – Damages – Insurance of goods – Policy not renewed by agent – Undertaking by agent to renew policy – Shop destroyed by fire – No claim possible against insurance company – Claim against agent for loss suffered.*

*[2] Privy Council – Practice – New points of fact and law – Concurrent findings of fact by lower courts – When new grounds of appeal will be entertained.*

**Editor's Summary**

This appeal brought by leave of the Court of Appeal against an order of that court dismissing with costs on appeal from the Supreme Court of Kenya whereby the appellants were ordered to pay the respondent a sum of Shs. 51,284/25 with interest. The respondent was lessee of a shop at Nairobi which with its contents was destroyed by fire on April 9/10, 1956, at a time when no policy of insurance thereon was in force. The stock-in-trade and furniture in the shop had been insured for Shs. 50,000/- apportioned as to

Shs. 40,000/- to stock-in-trade and Shs. 10,000/- to furniture. The appellants were insurance agents and were the chief agents of the insurers. The respondent's case was that the appellants were under a contractual obligation to procure the renewal of the policy and that since no policy was in force at the time of his loss he was unable to claim Shs. 46,270/75 under the policy in respect of the goods destroyed. It was common ground that in 1950 there was a meeting regarding the insurance between the respondent and a partner of the appellants when, it was claimed by the respondent, the appellants had agreed to renew his insurance without further instructions from the respondent, debiting his account with the premiums. At the trial a conflict of evidence concerning the alleged arrangement was resolved in favour of the respondent and judgment was given for the respondent which the Court of Appeal affirmed. On further appeal the appellants sought to have the concurrent findings of the Supreme Court and Court of Appeal reversed and contended that the agreement relied on by the respondent was not proved. As a ground of appeal that had not been relied on in either court below, it was submitted that the respondent was in breach of a condition of his policy in that he had failed to lock the books of accounts, etc., in a fireproof safe or remove them to another building at night when the premises were not actually open for business.

**Held –**

- (i) the appellants had failed to show that there was any evidence of such substantial miscarriage of justice that the concurrent findings of fact ought to be reversed.
- (ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below; accordingly,
- (iii) their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent's claim was to be defeated by reason of his breach of a condition in his contract of insurance.

*North Staffordshire Railway Company v. Edge*, [1920] A.C. 254, applied.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy*, [1946] A.C. 508.
- (2) *Lewis Ltd. v. Norwich Union Fire Insurance Co. Ltd.*, 1916 A.D. 509.
- (3) *Sacks v. Western Assurance Co.*, 1907 T.S. 257.
- (4) *North Staffordshire Railway Company v. Edge*, [1920] A.C. 254.

**Judgment**

**Lord Hodson:** This appeal is brought by leave of the Court of Appeal for Eastern Africa at Nairobi granted on March 2, 1961, against an order of that Court made on September 15, 1960, dismissing with costs an appeal from the Supreme Court of Kenya at Nairobi given on April 27, 1959, whereby the appellants (defendants) were ordered to pay to the respondent (plaintiff) the sum of Shs. 51,284/25 with interest thereon at the rate of 6 per cent. per annum from the date of judgment and further ordering the appellants to pay the costs of the respondent.

The respondent's claim arose in this way. He was the lessee of a shop at 2646 Bazaar Road, Nairobi, which was destroyed by fire together with the bulk of its contents on the night of April 9/10, 1956, at a time when no policy of insurance was in force covering the stock-in-trade and furniture contained in the building.

These contents had been insured with the Jubilee Insurance Company Ltd. under a policy dated November 17, 1950, for Shs. 50,000/- apportioned as follows: stock-in-trade Shs. 40,000/- and furniture Shs. 10,000/- at an annual premium of Shs. 175/-.

The appellants are a partnership carrying on business in Nairobi as insurance agents and are the chief agents of the Jubilee Insurance Company which is incorporated in Kenya having its head office at Mombasa.



The respondent's case was that the appellants were under a contractual obligation to procure the renewal of the policy on the stock-in-trade and furniture at his shop to the total value stated above and that since no policy was in force at the time of his loss he was unable to make a claim of Shs. 46,270/75 cents under the policy in respect of goods destroyed by the fire being the value of the stock less Shs. 3,729/25 cents, the value of goods salvaged.

The issues framed and agreed were:

- (1) Did the plaintiff employ the defendants as his agents to effect his insurances on his properties? If so on what terms?

- (2) Did the defendants commit any breach of that contract or were they negligent in their performance of it? If so what damage resulted?

It is common ground that in 1950 a meeting took place regarding insurance between the respondent and Mr. H. G. Thanawalla, a partner in the appellants' firm, but there was a conflict between them as to the terms of the arrangement which was undoubtedly made on that day.

The respondent said that it was arranged at this meeting that year by year the appellants would renew his policies of which that on the shop was one without any instructions from him and debit his account with the premiums. Mr. Thanawalla said on the other hand that it was not true that he agreed to keep on renewing policies without specific instructions so to do but that the policies were to be renewed on instructions in the ordinary manner. No one else was present at this interview. The respondent went on to say that the arrangement continued and that during the period in question Mr. Thanawalla had been buying goods at his shop and from that time the accounts were squared and any balance due for premiums paid as and when requested by Mr. Thanawalla. This again was denied by Mr. Thanawalla who said that, except on an occasion to be referred to later, he did not advance premiums on behalf of the respondent but that in accordance with the practice of the Jubilee Insurance Company a policy which fell due for renewal was renewed upon payment of the previous year's premium. Thus a year of grace was given before a policy lapsed by reason of non-payment of the premium due. When Mr. Thanawalla was shown a letter of November 1, 1954, written by him instructing the Jubilee Company to renew the policy on the shop for a further year Mr. Thanawalla said that when he wrote that letter, it was true he had no instructions to renew, but when he received a reply dated November 16, 1954, saying that the policy could not be renewed as the previous year's premium had not been paid he telephoned to the plaintiff to send a cheque. The respondent's evidence as to the practice followed was supported by that of his son Amirali Hasham Kara who assisted his father in the business from 1950 to September, 1955, and handled the insurance accounts. He confirmed the arrangement as to balancing the shop account for goods sold against the premiums due and said that Mr. Thanawalla had told him on several occasions not to worry about the policies as it was his duty to renew them and added that the policies were renewed without reference to him or his father.

Faced with the conflict of evidence between the respondent and his son on the one hand and Mr. Thanawalla on the other the learned judge was much assisted by what took place at a meeting which took place on April 10, 1956, immediately after the fire and by the action which Mr. Thanawalla then took.

On that day the respondent and his son called on Mr. Thanawalla at his office having received information from the latter's clerk to the effect that the policy had not been renewed. Two of the defendants' witnesses were present namely the Mukhi of the Ismaila community and the Kamadia of the same community. These witnesses were at all times unaware that there was any trouble about the insurance claim which the respondent was making. At this interview according to all these persons with the exception of Mr. Thanawalla himself the latter reassured the respondent and told him that he was fully covered, that he himself was flying to Mombasa to see the manager of the Jubilee Insurance Company and that he had written a letter to the company on behalf of the respondent. According to these four persons nothing was said at the meeting to the effect that the policy was not in force and the impression left in everyone's mind was that Mr. Thanawalla was intent on satisfying the respondent that his property was fully covered by insurance and he need not worry about payment of his claim. Mr. Thanawalla's subsequent action is significant. He made arrangements to fly to Mombasa but before his departure he paid into the account of

the Jubilee Insurance Company the sum of Shs. 439/50 which included Shs. 176/- in respect of the premium on Policy No. M.B. 4762, the policy in question. This he did without telling anyone of his intention so to do. According to a witness from the Jubilee Insurance Company, Mr. Gulamali Dewji Murji, this payment of Shs. 176/- was accepted by this company as renewing the policy up to November 17, 1954, but according to Mr. Thanawalla his object in making the payment was to be able to say when he got to Mombasa that the previous year's premium had been paid so that he could ask the company to renew up to before the fire and thus the claim could be settled.

The learned judge was satisfied that in making this payment on April 10, 1956, Mr. Thanawalla was under the impression that it would renew the policy up to November 17, 1955, and enable the respondent's claim to be considered having regard to the practice of the company in giving a year of grace where insurances were effected through an agent. In any event in the opinion of the learned judge the action of Mr. Thanawalla in making this payment supported the version given by the other witnesses as to what took place at the meeting on April 10, 1956. Judgment was accordingly entered for the respondent for Shs. 46,270/75 with interest and costs as claimed, the figure being arrived at by deducting Shs. 3,729/25 the value of the salvaged goods from Shs. 50,000/- the figure for which the stock and the furniture had been insured.

On appeal to the Court of Appeal of Eastern Africa after a full hearing and exhaustive argument the judgment below was affirmed the court seeing no reason for differing from the finding of the learned judge in favour of the respondent. These are the concurrent findings of fact which the appellants are asking their Lordships to disturb.

A subsidiary question, whether or not there was any consideration moving from the respondent to support the contract, was decided in favour of the respondent and the appellants have not pressed their argument that this decision was erroneous. Similarly the appellants no longer maintained that they were not the agents of the respondent.

They have however before their Lordships sought to maintain in face of the concurrent findings against them that the agreement relied upon by the respondent was not proved and in addition sought to raise as a ground of appeal not relied upon in either court that, even if they were wrong as to the agreement, damages could not be more than nominal since the respondent was in breach of a condition of the policy of insurance, that condition being in these terms:

- “7. Warranted that the insured keeps and during the currency of the policy shall keep a complete set of books of account and stock sheets or stock books, showing a true and accurate record of all business transactions and stock in hand, and such books shall be locked in a fireproof safe, or removed to another building at night, and all times when the premises are not actually open for business.”

Before hearing the appeal their Lordships considered a petition by the appellants for leave to adduce further evidence consisting of documents which have come to light since the making of the order of the Court of Appeal for Eastern Africa.

These documents are five in number. The first three are a letter and carbon copies of letters relevant to the transaction under consideration in this case which were found in a table which Mr. Thanawalla used at his office either at the back of a drawer or in a drawer where they were not expected to be. The last two documents are delivery books which would be required to prove that the originals of the copy letters reached their destination.

Their Lordships dismissed this petition being of opinion that assuming the further evidence to be

apparently credible and that it would have an important

influence on the result of the case it was not shown that it could not have been obtained with reasonable diligence for use at the trial.

Upon the main appeal the appellants have been constrained to rely on the sixth proposition relating to concurrent findings of fact which is to be found in the case of *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* (1), [1946] A.C. 508 at p. 521, where Lord Thankerton delivering the judgment of the Board reviewed its practice in rejecting appeals against considering concurrent findings of fact. The proposition reads:

- “6. That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.”

The appellants' main argument was that the respondent's case was on the face of it improbable and was inconsistent with the written documents available in the case which received scant if any consideration from the learned judge who tried the case or from the Court of Appeal in Eastern Africa.

These documents it is said show that the course of dealing between the parties was consistent with the case put forward on behalf of the appellants as to the agreement made in September, 1950, and inconsistent with the case put forward on behalf of the respondent.

Granted that the agreement proved was an unusual one from a commercial point of view in that it required an insurance agent to meet premiums as they fell due out of his own resources without instructions or amendment of particulars leaving him to recoup himself by balancing his account with the respondent at intervals, it may be explained by the close relationship which at all material times existed between Mr. Thanawalla and the respondent and perhaps some defects in the education of the respondent to which reference is made in the evidence of his son.

So far as the documents are concerned their Lordships do not think it necessary to analyse them in detail but express the view that they are not necessarily inconsistent with the practice stated by the respondent to have been followed. Their Lordships have in mind by way of illustration letters sent by the Jubilee Insurance Company to the respondent by way of reminder that premiums were due although on April 10, 1956, the appellants admittedly (without telling anyone) paid a premium to the company which they had never received from the respondent, and documents which show that the appellants liked to get the money from the respondent before they paid premiums due. One document however deserves notice for it is relied upon as showing that the evidence of the respondent about the interview of April 10, 1960, is inaccurate. On July 4, 1956, the respondent appears to have written to the Aga Khan as his spiritual father a letter in which he gives an account of his misfortune arising from the fire at his shop and the history of his claim. In this letter which was put in evidence but not put to the respondent in cross-examination he appears to have said that he knew at the time of the interview on April 10, 1956, at Mr. Thanawalla's office that the policy in question had not been renewed. This is in apparent contradiction to his evidence at the trial. If this letter had been used in cross-examination of the respondent it no doubt might have affected the learned judge's conclusion as to what took place at the interview on that day, but it would not as it seems to their Lordships place Mr. Thanawalla in any better position nor affect the final conclusion that Mr. Thanawalla was accepting the responsibility for payment of premiums as his. Their Lordships are of opinion therefore that the appellants fail to show that there are any documents which could be said to show that there has been such a substantial miscarriage of justice that the concurrent findings of fact ought to be reversed. On the

contrary they are of opinion that these documents do not go any distance towards destroying the respondent's case.

The second ground of appeal, depending on the allegation that the respondent was in breach of a condition of his policy, is said to be established by his own evidence that he kept stock books, that the stock books relating to the goods destroyed by fire were left on the shelf in the shop which caught fire – that the books were burned and that usually they took their books to their homes at night and put them in the safe but on this night they were left in the shop.

Their Lordships are of opinion that the appellants should not be allowed to take this point at this stage. In the first place the point could have been met by evidence that if the claim had been made against the company under a subsisting policy the company would not rely on the breach of the condition or possibly by some other evidence. Their Lordships would not depart from their practice of refusing to allow a point not taken before to be argued unless satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated would have supported the new plea. *Connecticut Fire Insurance Company v. Kavanagh*, [1892] A.C. 473 at p. 480, and *Archambault v. Archambault*, [1902] A.C. 575.

Even if the facts were beyond dispute and no further investigation of fact were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the court below. In this case the appellants have relied in support of their submission that there was a breach of condition on two South African cases, *Lewis Ltd. v. Norwich Union Fire Insurance Co. Ltd.* (2), 1916 A.D. 509, and *Sacks v. Western Assurance Co.* (3), 1907 T.S. 257, which on similar facts support their submission, but their Lordships are not prepared to say that the point is too plain for argument to be required upon it. The arguments and judgments in these two cases indicate that at any rate in the United States of America there are conflicting decisions on this topic and no direct authority in this country was available so far as the researches of the appellants were able to show. Accordingly their Lordships would not even if the question were a bare question of law entertain the submission that the respondent's claim is to be defeated by reason of his breach of a condition of his contract of insurance with the Jubilee Company and they would follow the guidance given by Lord Birkenhead, L.C., in *North Staffordshire Railway Company v. Edge* (4), [1920] A.C. 254 at p. 263, when he said:

“The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.”

The Lord Chancellor went on to say that there might be very exceptional cases where new matters might be considered, but their Lordships do not regard this case as requiring such exceptional treatment.

Accordingly their Lordships will humbly advise Her Majesty that this appeal be dismissed, subject to a variation in the amount of damages which by an oversight have been wrongly assessed.

The case presented by the respondent was at all times limited to compensation for the loss of his stock-in-trade although the plaint covered loss of furniture also. Under the policy the stock-in-trade was insured for Shs. 40,000/- and the furniture for Shs. 10,000/-. The evidence of Mr. Patel accepted by the learned judge as the basis of the assessment of damages related to stock-in-trade only and gave its value on April 9, 1956, as Shs. 50,611/12. The value of the salvaged

goods was given by another witness as approximately Shs. 3,729/25 and judgment was entered for the amount claimed Shs. 46,270/75 (as being a reasonable sum) with interest and costs. Since the claim, save in the formal pleadings, never in fact related to the furniture, the ceiling of the policy, which was subject to an average clause, was Shs. 40,000/- and not Shs. 50,000/- and the amount of damages must be altered from the sum awarded to Shs. 37,035/-, with interest at the rate fixed by the learned judge.

Notwithstanding this variation in the figure of damages, which their Lordships think must in justice be made, the appellants must pay the respondent's costs of this appeal and of the petition for leave to adduce further evidence.

*Appeal dismissed.*

For the appellants:

*FP Neill* (of the English Bar)

*Goodman, Derrick & Co*, London

For the respondent:

*JG Le Quesne, QC* (of the English Bar)

*TL Wilson & Co*, London

## **AG Abdulhussein & Co Ltd v Lellis Fernandes and others** [1963] 1 EA 282 (HCT)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 30 May 1963                               |
| <b>Case Number:</b>      | 3/1963                                    |
| <b>Before:</b>           | Biron J                                   |
| <b>Sourced by:</b>       | LawAfrica                                 |

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*[1] Rent restriction – Standard rent – Assessment – Premises comprising shops and dwelling accommodation – Statute not applicable to business premises – Basis of determining standard rent of dwelling accommodation – Rent Restriction Ordinance (Cap. 301), s. 2, s. 4 and s. 4 (2) (a) (T.) – Rent Restriction Act, 1962, s. 1 (2), s. 4 (1) (c) and s. 4 (2) (a) (T.).*

### **Editor's Summary**

The appellant was the owner of a building comprising shops on the ground floor and three stories above, each storey containing three flats, all of which were let to the respondents. The Rent Restriction Board determined the standard rent of the flats on the basis of a government valuer's report which, after calculating the rent for the whole building, apportioned forty per cent. of it for the shops and the balance

of sixty per cent. equally between the three floors of flats. The appellant appealed against the decision of the board and submitted that the standard rents of the flats should have been determined on the basis of the cost of construction of each individual floor and that there was no justification for apportioning forty per cent. of the total rent to the shops.

**Held –**

- (i) under the Rent Restriction Act, 1962, the Rent Restriction Board has neither the authority nor right to assess the standard or any rent of business premises.
- (ii) in case of a building comprising mixed premises, the board in ascertaining and determining the standard rent of the dwelling-house part has neither authority nor power to make any determination or even any assessment of rent in respect of the business premises, which are outside the scope of the Rent Restriction Act, 1962.
- (iii) the basis for determination of the standard rent of dwelling accommodation in mixed premises should be to ascertain the cost of construction of the building as a whole and then find the cost of each part at so much per cubic



or square foot in relation to the whole cost, and having found such cost the board should adjust the rentals between the flats, in accordance with and to reflect the superior amenities or other advantages individual flats may enjoy over other flats.

- (iv) the method adopted by the board in determining the standard rents of the flats was not in accordance with the Rent Restriction Act, 1962, and was therefore improper and contrary to law.

Appeal allowed. Determination of standard rents set aside. Case remitted to the Rent Restriction Board to determine the standard rents in accordance with law.

### No cases referred to in judgment

### Judgment

**Biron J:** This is an appeal brought by the appellant landlord from the determination of the Dar-es-Salaam Rent Restriction Board determining the standard rents of a block of flats.

It is not necessary to set out the individual rents determined, as the whole procedure adopted in making the determination and the very basis of the determination has been assailed and called in question.

The flats are comprised in a building situate in Arab Street, Dar-es-Salaam. The building itself consists of a shop or shops on the ground floor, above which there are three stories, each story containing three flats, all let out to the respondent tenants.

The evidence before the board was confined to that of two witnesses, both expert witnesses. They were Mr. Cameron, a government valuer, and Mr. Dinker J. Patel, who described himself as a civil and structural engineer and who had prepared the plans of the building. Each expert produced a report. The relevant part of the government valuer's report reads:

"The cost of construction is accepted. Thus –

|  |   |                  |               |
|--|---|------------------|---------------|
| 14 per cent. of Shs. 272,000/- .....             | = | Shs.<br>38,080/- |               |
| Ground rent .....                                | = | 1,060/-          |               |
| Rates .....                                      | = | 640/-            |               |
| 1/60 <sup>th</sup> Premium of Shs. 5,800/- ..... | = | 100/-            |               |
|  |   | Shs.<br>39,880/- | per<br>annum  |
| 1 floor of shops .....                           |   | Shs.<br>23,928/- | per<br>annum  |
| 3 floors of flats – 60 per cent., or .....       |   | Shs.<br>1,994/-  | per<br>annum" |

Mr. Dinker's report is contained in a letter which reads as follows:

"As requested by you we herewith give the cost of construction as estimated by us for each floor of the above

said building:

|        |  |                   |
|--------|--|-------------------|
| 1.     | Ground floor including colonnade ..... | Shs.<br>76,000/-  |
| 2.     | First floor .....                      | 64,000/-          |
| 3.     | Second floor .....                     | 66,000/-          |
| 4.     | Third floor .....                      | 66,000/-          |
| Total: |  | Shs.<br>272,000/- |

“It should be noted that though the cubic feet for the ground floor construction will be comparatively higher due to the bigger floor height, the cost of construction will be much less than the upper floors per cubic foot. This is due to the fact that there will be less doors and windows, less walls and less sanitary fittings, etc., per cubic foot, for the ground floor than the upper floors.”

The respondents were not represented by counsel at the hearing, but the appellant was represented by two learned counsel, each of whom made separate submissions. The submission of one, Mr. Patel, was that the standard rents should be determined on the basis of the cost of construction of each floor as given in evidence by Mr. Dinker. Mr. Sayani, the other learned counsel, attacked the government valuer's apportionment as to forty per cent. of the whole rent being borne by the shop part of the building and the balance of sixty per cent. to be divided equally between the three floors of flats. He submitted that the area was not such a commercial area as to justify forty per cent. of the whole rent being apportioned to and borne by the business part of the premises.

The determination of the board is short and can be set out in full:

"In this application the apportionment made by the government valuer between the floor of shops and the flats was solely in dispute. The total cost of construction was not in dispute, but the board were asked by the applicants to consider the cost of the construction of each floor as the lawful basis *inter alia* for determination of standard rents. The question as to the existence or not of special circumstances was also raised.

"The board has now considered this matter at some length, and also the submissions made by both counsel.

"We are of the opinion that whereas a rule of thumb in regard to such matters of apportionment may exist, such rule was not applied to the present application without thought. The government valuer clearly established in his evidence that he had considered that apportionment and considered it to be a reasonable one in the circumstances existing. We are also of the opinion that the report is accurate and fair, and the apportionment made therein correctly computed.

"We can see no reason whatever to disagree therewith or with any part thereof. It follows also therefrom that we do not consider any special circumstances exist in the circumstances made known. We accordingly estimate the standard rents in manner following:

|                                   |             |
|-----------------------------------|-------------|
| 2 front flats on each floor ..... | Shs. 225/-  |
| Rear flat on each floor .....     | Shs. 215/-" |

The ground of complaint from this determination as set out in the memorandum of appeal is:

- "(1) The board erred in not considering the arguments and submissions made with regard to the apportionment of the cost of construction.
- (2) The board, having come to the conclusion that the government valuer had applied his rule of thumb in apportioning rents, has failed to apply the principles of law prescribed by the Rent Restriction Act, 1962.
- (3) The board should have held:
  - (i) that the premises described in para. (1) of each application were the premises as defined by the above Act;
  - (ii) that for the purposes of the determination of the standard rent of the said premises under s. 4 (1) (c) and s. 7 (1) (b) of the above Act, the market cost of erection of each of the said premises should have been ascertained and such cost of erection should have been taken as the basis for the determination of the standard rent of each of the said premises or for the apportionment of the standard rent of whole building.

(4) The board should have held:

- (i) that the market cost of erection of each floor of the building in which the above premises are comprised is as follows:

|  |                  |
|--|------------------|
| Ground floor including colonnade. ....           | Shs.<br>76,000/- |
| First floor (Applications No. 228, 229 and 230)  | 64,000/-         |
| Second floor (Applications No. 231, 232 and 233) | 66,000/-         |
| Third floor (Applications No. 234, 235 and 236)  | 66,000/-         |

- (ii) and that the standard rent of Shs. 39,880/- per annum of the whole building should have been apportioned amongst each floor in proportion to the above cost of construction of each floor and thereafter reapportioned amongst each flat in proportion to each flat's cost of erection."

It is abundantly clear from the determination of the board that the board did not even consider the submission on behalf of the appellant landlord that the determination of the standard rents should be based on the cost of construction of each individual floor, let alone rule on such submission. It is therefore incumbent on this court to consider and decide this issue as to how the standard rents of residential accommodation comprised in a building of mixed premises, i.e. dwelling-house and business premises, are to be determined.

It is well within the judicial notice of this court that under the old Rent Restriction Ordinance (Cap. 301), since expired, it was the standard practice of boards in the determination of the standard rents of mixed premises, comprised in a building erected or substantially reconstructed after September 3, 1939, the prescribed date in the Ordinance, to find first the market cost of construction of the premises as a whole. The next step was to decide what percentage, which originally was not to exceed ten and a half per cent., later increased to eleven per cent., to allow on such cost of construction. To this were added the prescribed allowances for ground rent or its equivalent and rates. The figure thus found, which would constitute the standard rent of the whole building, would then be apportioned between the business premises and the dwelling-house part as an aggregate whole. The business premises would be considerably weighted as against the dwelling-house part of the building, on the ground that as its use was for profit and gain it should bear a greater proportion of the rent than residential accommodation. The percentage of the rent to be borne by the dwelling-house part would then be apportioned amongst the individual flats. In making such apportionment consideration would be given to the advantages and amenities enjoyed by some flats as opposed to others and these would attract higher rentals. Although it may be argued that the sole basis for the standard rent was the market cost of construction, that is, of each individual entity whether the business premises or the dwelling-house part, in the latter event of each individual flat adjudged as a separate unit, this method of apportioning the rents was justified by the application of s. 4 (2) (a) of the Ordinance, that –

"in the case of any premises in regard to which a board is satisfied that in the special circumstances of the case it would be fair and reasonable to alter whether by way of increase or reduction the amount of the standard rent as ascertained in accordance with sub-s. (1) or (1) (a) of this section, the board may assess the standard rent of such premises at such figure as the board shall in all the circumstances of the case consider reasonable."

This procedure has been continued apparently unquestioningly until this instant case, under the new Rent

Restriction Act which came into force and was applied to Dar-es-Salaam as from August 20, 1962 (Government Notice No. 344 of 1962).

In the old Ordinance standard rent was defined in s. 2 as:

“ ‘standard rent’ in relation to any premises has the meaning assigned to it by s. 4 of this Ordinance.”

Section 4 set out how the standard rent of premises was to be determined. “Premises” was defined likewise in s. 2, as:

“ ‘premises’ means any dwelling house or business premises as herein defined to which this Ordinance is applied by sub-s. (2) of s. 1 hereof.”

In the same section, dwelling-house and business premises were also defined. A board was therefore, under the Ordinance, not only justified in ascertaining the standard rent of the whole of a building comprising business premises and residential accommodation, but it was under a duty to determine the standard rent of the business premises part as well as of the residential accommodation.

The position in law is not the same under the new Act. Standard rent is defined in the Act as

“ ‘standard rent’ in relation to any premises has the meaning assigned to it by s. 4”.

Section 4, after laying down how the standard rent of premises in existence at the prescribed date, which is July 1, 1959, is to be determined, goes on to set out how the standard rent of premises erected or substantially reconstructed after such date is to be determined. By cl. (c) of sub-s. (1) this is an amount which shall not exceed fourteen per cent. of the market cost of erection or reconstruction plus the prescribed allowances for ground rent or an annual equivalent thereof and rates. “Premises” in the Act is defined as

“ ‘Premises means any dwelling house as herein defined to which this Act is applied by sub-s. (2) of s. 1’ ”.

It is not necessary to set out the definition of dwelling-house. It is sufficient to note that the definition of “premises” is confined to dwelling-house accommodation. Unlike the Ordinance, whereunder “premises” included business premises, business premises are not within the operation and purview of the Act. A board therefore has neither authority nor right to assess the standard or any rent, of business premises. Thus, in a case of a building comprising mixed premises, the board in ascertaining and determining the standard rent of the dwelling-house parts has neither authority nor power to make any determination or even any assessment of rent in respect of the business premises, which are outside the scope of the Act. In other words, the business premises and the dwelling-house parts of the building must be treated as two separate and distinct entities. The business premises part being outside the jurisdiction of the board, the board must confine itself to ascertaining and determining the standard rent of the dwelling-house accommodation, which determination is based on the market cost of construction of the dwelling-house part of the building.

The question immediately poses itself, how is the market cost of construction of this dwelling-house part of the building to be ascertained? To take the actual cost of construction of the dwelling house part, ignoring the cost of construction of the remainder of the building of which the dwelling-house part is but a part – a very dependent part – would obviously be most unrealistic and unfair. To take the building the subject matter of this instant case as an example, it would obviously be most unrealistic and unfair to take the cost of construction of the three upper stories as the basis for the determination of the standard rent, completely disregarding the cost of construction of the ground floor including

the foundations, on which the whole building is based and on which the upper stories are dependent for access.

To my mind, the fairest and most practical method to adopt would be to ascertain the cost of construction of the building as a whole and then find the cost of each part at so much per cubic or square foot in relation to the whole cost. It is possible to adopt either means of measurement, the cubic content or the floor area. It may well be argued that the cubic content would be the fairer basis. I am, however, informed that in this country, in costing, it is more usual to adopt the floor area as the basis for valuation. I propose to leave the question as to which standard of measurement to adopt, the floor area or the cubic content, to the board. Without, however, attempting to fetter the discretion of the board, it will, I think, be appreciated that uniformity is desirable. To achieve this I would suggest that the board call a general meeting of all its members in order to decide which standard to adopt.

It should thus be practicable and comparatively easy to ascertain the cost of construction of each floor or even of each individual flat. Having found such cost, the board could still adjust the rentals between the flats in accordance with, and to reflect, the superior amenities or other advantages individual flats may enjoy over other flats. This is obviously just and equitable in principle, and to my mind, proper in law, being authorised under the provisions of s. 4 (2) (a) (which is the same as the corresponding clause in the old Ordinance), that –

“Notwithstanding anything contained in the foregoing provisions of this section –

- (a) in the case of any premises in regard to which a board is satisfied that in the special circumstances of the case it would be fair and reasonable to alter whether by way of increase or reduction the amount of the standard rent as ascertained in accordance with sub-s. (1), the board may assess the standard rent of such premises at such figure as the board shall in all the circumstances of the case consider reasonable.”

Although the method of ascertaining or determining the standard rent of mixed premises adopted by the board in this case was the standard practice Under the old Ordinance and has been continued under the new Act, and such procedure has in the past worked well and justly, it is I think, abundantly clear for the reasons set out, that under the Act now in force, which does not cover business premises, such procedure is not in accordance with the provisions of the Act, and is therefore improper and, even contrary to, law.

For the reasons set out the appeal must be and accordingly is, allowed. The determinations of the standard rents in all these instant cases are accordingly set aside. And the cases are all remitted to the board to determine the standard rents in accordance with law.

The question of costs is not without difficulty and I propose to defer making any order as to costs pending argument by learned counsel.

*Appeal allowed. Determination of standard rents set aside. Case remitted to the Rent Restriction Board to determine the standard rents in accordance with law.*

For the appellant:

*GS Patel and NRD Sayani*

For the respondents:

*PR Dastur*

For the appellant:

*NS Patel & Co, and Sayani & Co, Dar-es-Salaam*

For the respondents:

*PR Dastur, Dar-es-Salaam*

**Yusuf Alimohamed Osman v DT Dobie & Co (Tanganyika) Ltd**  
[1963] 1 EA 288 (HCT)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 15 March 1963                             |
| <b>Case Number:</b>      | 9/1962                                    |
| <b>Before:</b>           | Biron J                                   |
| <b>Sourced by:</b>       | LawAfrica                                 |

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*[1] Pleading – Claim for work done and materials supplied – Averment in plaint that work was done and at defendant’s request – Defence a general denial of indebtedness – Alternative defence that claim compromised – No specific denial of averment in plaint – Whether defence is an admission that work done – Indian Civil Procedure Rules, O. VIII, r. 3 and r. 5 – Indian Contract Act, 1872, s. 70.*

### **Editor’s Summary**

The respondent claimed from the appellant a sum, part of which was for work done and materials supplied. The plaint averred that the work was done and that it was done at the appellant’s request. The defence was a general denial of liability which did not specifically traverse the averment in the plaint. An alternative defence was that the claim was compromised by payment of a mutually agreed sum to the respondent. The only evidence as to the work alleged to have been carried out, was a job card produced by a witness who was not the maker of the card and who had no personal knowledge whether the work was carried out. It was common ground that the appellant had brought in and left his vehicle at the respondent’s garage for the brakes to be adjusted and this was expressly so stated on the job card produced. The magistrate found in favour of the respondent, that the claim had not in fact been compromised, and that Shs. 2,054/27 was due to the respondent for the work done. The magistrate made no specific findings that the work was in fact done or that it was done at the appellant’s request, or whether a request or authorisation to adjust brakes would cover major work being done even if such work were necessary, without further authorisation. The grounds of appeal from this decision were that it was not established that the work to which the disputed invoice referred was in fact done, or that, if it had been done, that it was done at the appellant’s request; and that the magistrate should have accepted appellant’s evidence as to the claim having been compromised. For the respondent, relying on O. VIII, r. 3 of the Indian Civil Procedure Rules, it was submitted that it was not open to the appellant to dispute that the work was done or that it was done at his request as those two facts were admitted by the appellant in his pleading.



**Held –**

- (i) although the pleading was defective para. 1 of the defence in which the appellant denied indebtedness to the respondent for the sum claimed or at all not only by implication but expressly denied the respondent's claim that the work was done and that it was done at the appellant's request; this excluded the possibility of any admission being implied.
- (ii) the production of the job card was not evidence that the work set out therein was in fact done, and accordingly there was no evidence to establish that the work was done for which payment was claimed.
- (iii) a request or authorisation to adjust brakes did not cover major work entailing expenditure much greater than would be within the contemplation of the appellant and accordingly work done in excess of the request of authorisation was not covered by such request or authorisation.

Appeal allowed. Judgment and decree of the district court set aside.

## No cases referred to in judgment

### Judgment

**Biron J:** This is an appeal from the judgment and consequent decree of the Dar-es-Salaam district court awarding the respondent company Shs. 2,054/27 for work done and materials supplied with costs and interest at 6 per cent.

It is material and necessary to set out para. 2 and para. 3 of the plaint and para. 1 and para. 2 of the written statement of defence. They read as follows:

“2. The plaintiff’s claim is against the defendant for Shs. 7,174/06 only being –

- (a) 2,249/27 only being the account for work done and materials provided by the plaintiff in motor vehicles of the defendant at defendant’s request between October 1, 1959 to May 30, 1960.
- (b) 358/49 being the price of the goods sold and delivered to the defendant at his request between October 1, 1959 to May 30, 1959.
- (c) 4,566/00 being insurance premium paid to Karimjee Jiwanjee & Co., as agents for New India Insurance Co. Ltd. at Dar-es-Salaam on or about December 12, 1959, for and on behalf of the defendant and at his request for two vehicles namely DST. 14 and DSR. 96;

Shs. 7,174/06 Total:

Less 582/10

Shs. 6,591/96 Balance

.....

“3. The said requests were made verbally by the defendant. Exhibit ‘A’ contains all the particulars of the plaintiff’s claim. The prices of the said goods sold and delivered to the defendant was agreed upon by the defendant or alternatively it is reasonable. The charges of the said work done is also reasonable. The sum is not paid by the defendant in spite of repeated demands.”

.....

“1. The defendant denies that he is indebted to the plaintiff company in the sum of Shs. 6,591/96 as alleged in the para. 2 and para. 3 of the plaint or at all.

“2. Alternatively, the defendant states that on or about January 3, 1961, it was verbally agreed that the defendant should pay and the plaintiff company should accept the sum of Shs. 4,583/- in full and final satisfaction of the plaintiff company’s claim against the defendant. It was further agreed that the plaintiff should accept the sum of Shs. 250/- in full settlement of legal costs in the suit herein. The defendant accordingly paid the plaintiff company and the plaintiff company accepted and received on the said date the said sums of money in full and final satisfaction of the plaintiff company’s claim against the defendant.”



The issues were framed as follows:

- (1) Did the plaintiff accept Shs. 4,833/- in full settlement of their claim against the defendant;
- (2) If not, then is the sum of Shs. 2,204/27 or any part thereof due to the plaintiff.

The evidence was limited to that of two employees of the plaintiff company on behalf of the company and, to that of the defendant and included some correspondence between the parties. The two employees gave evidence to the effect that the appellant disputed one invoice and paid the balance owing, on the understanding that the work to which the disputed invoice referred would be investigated. If it was found that the money to which this invoice referred was in fact due, the appellant promised that he would pay, and alternatively, if it was found that the money was not in fact due, he would be given a credit for such amount. The appellant in his evidence denied that the work to which the disputed invoice referred was in fact done, or that he had ordered or authorised such work to be done, and he also asserted that the whole claim against him was compromised on the payment made by him, as averred in the written statement of defence.

The learned magistrate found in favour of the respondent company that the claim had not in fact been compromised as contended by the appellant, and that Shs. 2,054/27 was due to the company in respect of this disputed invoice. It is from this finding that this appeal has been brought.

The grounds of appeal are in effect that it was not established that the work to which the disputed invoice referred was in fact done, or that if it had been done, that it was done at the appellant's request, and also that the learned magistrate should have accepted the appellant's evidence as to the claim having been compromised.

It was submitted by Mr. Master, who appeared for the respondent at the hearing of this appeal, that it was not open to the appellant to dispute that the work was done or that it was done at his request, as these two facts were admitted by the appellant in his pleading. Learned counsel referred to and relied on O.XVIII, r. 3 of the Indian Civil Procedure Rules, which reads:

"It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except the damages."

It cannot be disputed that the written statement of defence fails to comply with the rule and is in fact defective. But is such defect necessarily fatal? To my mind, it is saved by r. 5 of the same Order, which reads:

"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability;

"Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

To my mind, para. 1 of the written statement of defence that:

"The defendant denies he is indebted to the plaintiff company in the sum of Shs. 6,591/96 as alleged in the para. 2 and para. 3 of the plaint or at all,"

not only by implication but expressly denies the company's claim as laid in para. 2 of the plaint which sets out the work done and materials supplied, and

as laid in para. 3 of the plaint which avers, *inter alia*, that the work was done at the plaintiff's request. To my mind, although the pleading is defective, it traverses the averment in the plaint in respect of the work done or that it was done at the appellant's request, at lowest, sufficiently to exclude the possibility of any such admission being implied.

It is also abundantly clear from the fact that an issue was framed in respect of this disputed invoice, which is referable only to this work alleged to have been done and done at the appellant's request, that neither the parties nor the court accepted the written statement of defence as implying such admission.

In his evidence, the appellant denied that the work was done or if done that it was done at his request. He stated, *inter alia*:

"I do not think the work was done and I was not shown the spares . . . I denied the work was done . . . when I received the invoice I had it explained to me. I did not consider that the work was done . . . When I collected the vehicle and before I received the invoice I did not know of the work carried out. I first knew about the work was when I received the invoice (*sic*). The work was not done."

The appellant's evidence cannot be construed as other than an emphatic denial that the work for which payment was claimed was in fact ever done, let alone done at his request. Nor was such denial a belated defence appearing for the first time at the hearing of the case, as is not so unusual in litigation of this nature. The respondent company's own witness, Mr. McGregor, said:

"I remember in January of this year (1961), when the defendant came to me about his accounts. He disputed one invoice and agreed to everything else. I agreed to go into the matter and examine what work had been done."

Again after referring to the payment made by the appellant, the same witness said:

"Any money he paid me was off the bill and it was agreed that I would go into the question of invoice No. 11259 and that if necessary I would give him a credit or he would pay us."

A letter from the respondent company addressed to the defendant and dated July 4, 1960, was produced. Paragraph 1 of this letter reads:

"Further to your visit to our workshop concerning the above invoice, we have gone into the position carefully and are satisfied that the work was in fact, carried out."

It is thus abundantly clear that from the very outset the appellant disputed that the work had in fact been done, apart from his contention that even if it was done, it was not done at his request.

It was therefore incumbent on the court to consider and determine whether the work as alleged was in fact done. In his judgment the learned magistrate stated:

"Mr. Osman said he did not think that the work was done because he was not shown the spares but he did not have the vehicle examined at any other garage to see if work had been carried out. In the defence it is not denied that the work was carried out but merely that the defendant is not indebted to the plaintiff company particularly in view of the alleged settlement in January, 1961. I think there is no doubt that the work was done and that the defendant knew that a major job was being carried out and hence the cause of the motor vehicle being in the garage for 4 days."

That can hardly be construed as a definite finding by the court that the work was in fact done. The learned magistrate is apparently relying on the fact that “in the defence it is not denied that the work was carried out”. With respect, as already pointed out, the defence cannot be construed as an admission that the work was in fact carried out. It was therefore incumbent on the court to make a specific finding in that regard. Whether or not the learned magistrate’s statement can be construed as a specific finding, it is submitted by Mr. Beynon for the appellant, that there was no evidence before the court that the work was in fact carried out. The only evidence as to such work as alleged having been carried out, was a job card produced. This job card, however, which was not produced by the maker but by the witness Mr. McGregor, who himself had no personal knowledge as to whether or not the work was carried out, is not evidence that the work as set out therein, was in fact performed. Learned counsel’s contention that the evidence does not establish that the work for which the payment was claimed was in fact performed, must therefore be sustained.

The second leg of the appellant’s defence was that even if the work was carried out, it was not carried out on his instructions or request.

It is common ground that the appellant brought in and left his vehicle at the respondent company’s garage for the brakes to be adjusted. This is expressly so stated on the job card produced. Under the heading “Owner’s instructions” appear the words, “Adjust brakes”, and the card bears the appellant’s signature, apparently in accordance with the company’s routine procedure that the vehicle owner should endorse the instructions for the work to be done with his signature. The letter from the respondent company from which an extract was quoted above, goes on to say,

“We realise that you did not in fact ask for all this work to be undertaken but at the same time we would point out that where defects are apparent, we are loathe to allow the vehicle to go back on the road without attending to them. You are naturally upset at being faced with these charges etc . . .”

The letter goes on to suggest a reduction in the charges. In his evidence Mr. McGregor stated – apparently in answer to the court:

“The instructions of the defendant were to adjust the brakes which meant to make the brakes work and to do this job properly it was necessary to carry out the repairs that were carried out.”

On this aspect of the case the learned magistrate found, commencing with the passage above quoted which ended with “for four days”,

“His real objection to the invoice was I believe his statement that the prices were very high which is a very different matter from saying that the work was not done or that to adjust brakes meant 30 minutes work when he knew full well that the particular adjustment was going to involve a lot of time and spares and also a greater amount of money than what one would pay for tightening screws”.

The learned magistrate has not made any finding as to whether a request or authorisation to adjust brakes would cover major work being carried out even if such work were necessary, without further authorisation. It is therefore necessary for this court to determine that question.

“Adjust” has many meanings depending on the context in which it is used. No useful purpose would, I think, be served in setting out the various dictionary definitions of “adjust”. Its particular meaning in any given context is determinable by the context in which it appears. Although as remarked by Lord Parker, C.J., that “Judges are not expected to know the facts of life”, the

expression “adjust brakes” has a sufficiently widespread and popular connotation to be within judicial knowledge. To my mind, a request or authorisation to adjust brakes does not cover major works entailing expenditure much greater than would be within the contemplation of the person authorising the work, particularly so in the peculiar circumstances of this case, where the respondent company takes the precaution, doubtless to safeguard its own interests, to have the customer sign the job card setting out what work is to be done. This precaution is not of unilateral benefit, it works in the favour of the customer as well, that additional work involving major expenditure should not be carried out without his authority. I, therefore, consider that work in excess, so much in excess as in this case, of the request or authorisation to adjust brakes, is not covered by such request or authorisation.

As noted, this aspect was not dealt with by the learned magistrate, but he appears to have found – unless I have misread the passage from his judgment above quoted – that the appellant is liable for the work done, because he must have known of, and acquiesced in, such work being carried out. Even if the appellant could in such circumstances be held liable for the work, with respect, the evidence to my mind, does not establish such finding.

Mr. Master submitted that even if the work was not carried out at the appellant’s request, the appellant is still liable for such work by s. 70 of the Indian Contract Act, 1872, which reads:

“Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

(At the relevant date of the transaction between the parties, the Indian Contract Act was still in force.) Even if it were open to the respondent company to set up a claim under s. 70 of the Indian Contract Act, at this stage, I am not persuaded that the appellant would be liable under the section if the work was in fact carried out. This is not a case where it can be said a person must pay for the benefit he receives, otherwise he should return the benefit. What could the appellant do? Was he obliged to have the vehicle stripped and to have whatever work was done, undone, and spare parts removed? As stated in the commentary by Pollock and Mullah on the section, “A man is not bound to pay for that which he has not the option of refusing”. However, in view of the finding that it has not been established that the work was in fact done, this issue is really academic. Likewise in view of such finding on the issue as to whether the work was in fact done or not, it is not necessary to consider the ground of appeal in respect of the learned magistrate’s finding that the claim was not compromised before the hearing of the suit.

The question of costs has caused me some concern. It is apparent from the proceedings that the manner in which the case for the appellant was conducted was such as could induce a belief that the second issue was merely a minor one, as evidently it did in the learned magistrate, who in his judgment introduced his consideration of the issue as to whether the claim was compromised, with,

“To return to the crux of the case, which is whether or not the meeting in January, 1961, between Mr. McGregor and the defendant ended with a complete settlement in the matter” etc . . .

However, this issue was not in fact either admitted or abandoned. The court would not, therefore, be justified in departing from the general rule that costs should follow the event.

The appeal is accordingly allowed with costs to the appellant. The judgment and decree of the district court is set aside and there is substituted an order that the respondent company's claim is dismissed with costs.

*Appeal allowed. Judgment and decree of the district court set aside.*

For the appellant:

*AC Beynon and AG Kinariwala*

*Sayani & Co, Dar-es-Salaam*

For the respondent:

*KA Master, QC and RC Kesaria*

*RC Kesaria, Dar-es-Salaam*

**Ali Mohamed Hassani Mpanda v Republic**  
[1963] 1 EA 294 (HCT)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 31 May 1963                               |
| <b>Case Number:</b>      | 255/1963                                  |
| <b>Before:</b>           | Spry J                                    |
| <b>Sourced by:</b>       | LawAfrica                                 |

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*[1] Criminal law – Minor offence – Power of court to substitute such a conviction – Charge of obstructing police officer in due execution of duty – Conviction of assault occasioning actual bodily harm – Whether minor offence must be cognate to major offence charged – Penal Code (Cap. 16), s. 222 (2), s. 241, s. 243 (b) (T.) – Criminal Procedure Code (Cap. 20), s. 181 (T.) – Criminal Procedure Code, s. 179 (2) (K.) – Indian Code of Criminal Procedure, 1898, s. 238.*

**Editor's Summary**

The appellant was charged with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of the Penal Code. The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s. 241 of the Penal Code. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged.

**Held –**

- (i) s. 181 of the Criminal Procedure Code can only be applied where the minor offence is arrived at by



a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.

- (ii) an essential constituent of the minor offence of assault occasioning actual bodily harm is not an essential constituent of the major offence of obstructing a police officer in the due execution of his duty and the charge as drawn did not give the appellant notice of all that constituted the offence of which he was convicted, since it contained no allegation of assault; accordingly s. 181 of the Criminal Procedure Code was not applicable and the conviction under s. 243 (b) of assault occasioning actual bodily harm must be set aside.

*Wachira s/o Njenga v. R.* (1954), 21 E.A.C.A. 398, applied.

Appeal allowed. Conviction quashed and sentence set aside.

**Cases referred to in judgment:**

- (1) *Robert Ndecho and Another v. R.* (1951), 18 E.A.C.A. 171.
- (2) *Paulo s/o Busondo and Another v. R.* (1953), 20 E.A.C.A. 317.
- (3) *Wachira s/o Njenga v. R.* (1954), 21 E.A.C.A. 398.

## Judgment

**Spry J:** The appellant was charged with others with the offence of obstructing police officers in the due execution of their duty, contrary to s. 243 (b) of the Penal Code (Cap. 16). The particulars alleged that the persons charged wilfully obstructed five named police officers in the due execution of their duties, in that the person charged prevented the police officers seizing some native liquor unlawfully possessed and being consumed by the villagers of Changedele village. The learned resident magistrate found the appellant not guilty of the offence charged but convicted him of the lesser offence of assault occasioning actual bodily harm, contrary to s. 241 of the Penal Code.

The appellant in his petition of appeal merely reiterates that he was not present when the alleged offence was committed. At the hearing of the appeal, however, the more difficult question was considered whether the court had power to substitute a conviction for the lesser offence.

This could be done, if at all, only under s. 181 of the Criminal Procedure Code (Cap. 20), which reads as follows:

- “181. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

Sub-section (2), or rather sub-s. (2) of s. 179 of the Kenya Criminal Procedure Code which is in identical terms, was considered at length in *Robert Ndecho and Another v. R.* (1) (1951), 18 E.A.C.A. 171, in which it was said:

“The governing word in this sub-section is the word ‘reduce’, and the sub-section cannot be read as if the words ran ‘and facts are proved which reveal another offence’ . . . In our opinion we have no doubt that the legislature both intended and have so expressed the intention that the minor offence must be cognate to the major offence charged.”

This was followed by the case of *Paulo s/o Busondo and Another v. R.* (2) (1953), 20 E.A.C.A. 317, in which, in a brief judgment, the Court of Appeal held that a person charged with an offence contrary to s. 222 (2) of the Tanganyika Penal Code could properly be convicted of an offence contrary to s. 243 (b). It appears that in an attempt to prevent an arrest, the accused had fired arrows, causing a police party to retreat. The trial court was not satisfied that it had been proved beyond reasonable doubt that the accused had intended to strike any person with the arrows they fired, and accordingly convicted them of the lesser offence of wilfully obstructing a police officer in the due execution of his duty. The Court of Appeal, in upholding the conviction, considered whether the trial judge could properly convict the accused of the minor offence and observed:

“We think he clearly could because the cognate element here between the two offences is the intention to resist a lawful arrest.”

It would seem that in both these cases the Court of Appeal regarded the two sub-sections of s. 181 of the Criminal Procedure Code as independent provisions, because it is clear that the accused in *Paulo Busondo’s* case (2) could not have been convicted of an offence against s. 243 (b) of the Penal Code under the

provisions of sub-s. (1) of s. 181, since there are essential elements of the offence created by s. 243 (b) which are not necessarily elements of the offence created by s. 222 (2). Sub-section (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence.

The next important decision is that in *Wachira s/o Njenga alias Kiberege s/o Njenga v. R.* (3) (1954), 21 E.A.C.A. 398, decided by a full Bench of the Court of Appeal. That case also concerned s. 179 of the Kenya Criminal Procedure Code, and the court held that s. 179 can only be applied where the minor offence is arrived at by a process of subtraction from the graver charge, and

“where this is not the case, where the circumstances embodied in the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter”.

In this decision, the court was following all the learned commentators on s. 238 of the Indian Code of Criminal Procedure, from which s. 179 of the Kenya Code and s. 181 of the Tanganyika Code were derived.

What is immediately significant is that both the majority decision and the dissenting judgment of Briggs, J.A., refer throughout to s. 179 as such and not to either of its sub-sections. It is, I think, clear that the court considered that the section had to be applied as a whole. On this interpretation, as I understand it, the only distinction between the two sub-sections is that the first relates to cases where the prosecution fails to prove, while the second relates to cases where the defence disproves, one or more of the essential ingredients of the major offence. The tests whether the offences are cognate remain the same, and sub-s. (2) is not, as it seems at first sight, wider in its scope than sub-s. (1). It follows, I think, that the decision in *Wachira's* case (3) must be regarded as overruling that in *Paulo Busondo's* case (2), even though the former contains no reference to the latter.

Applying the principles of *Wachira's* case (3), there are two factors that have to be considered: first,

“whether the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also”,

and, secondly, whether the charge under s. 243 (b) gave the accused notice of all the circumstances going to constitute the offence under s. 241 of which he was convicted. Mr. Rugarabamu, for the Republic, submitted that in cases of obstruction there is generally an element of assault and that the evidence in the case under appeal clearly showed an actual assault. With respect, that is not enough. I do not think it can possibly be argued that wilful obstruction *necessarily* involves any element of assault: a person who lies down in the road in front of a police vehicle is undoubtedly guilty of obstruction but equally certainly is not guilty of assault.

It seems to me that the present case fails to meet either of the two tests: an essential constituent of the minor offence, the actual assault, is not an essential constituent of the major offence of wilful obstruction and the charge as drawn did not give the appellant notice of all that constituted the offence of which he was convicted, since it contained no allegation of assault. It is immaterial that the appellant could have been charged with assault under s. 243 (b): he was

not so charged and all that is relevant is the actual charge, which was one of obstruction.

The conviction is accordingly quashed and the sentence set aside. The appellant is to be released immediately, unless lawfully held on any other charge.

*Appeal allowed. Conviction quashed and sentence set aside.*

The appellant did not appear and was not represented.

For the respondent:

*RGW Rugarabamu* (State Attorney, Tanganyika).

*The Attorney-General*, Tanganyika

## **The Commissioner of Income Tax v MRG** [1963] 1 EA 297 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 25 January 1963                 |
| <b>Case Number:</b>      | 3/1963                          |
| <b>Before:</b>           | Slade J                         |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Income tax – Appeal – Assessment – Parol declaration of trust of income – Express intention that income of estate be divided between parent and children – Whether income thereby vested in parent and children – Deed of family arrangement – Whether parent liable to tax on whole estate income – East African Income Tax (Management) Act, 1958, s. 111 (4) and s. 133 (c).*

### **Editor’s Summary**

The respondent was assessed for payment of tax on chargeable income for the year of income 1958, part of which amount, namely, £20,326, was specified in the notice of assessment as “other income”. The respondent disputed the assessment on the ground that only one-ninth of that sum should have been assessed upon her as she had in September, 1958, declared a trust, the beneficiaries of which were her children and herself and that she was entitled to that proportion only of the income in question. The appellant having refused to amend the assessment the respondent appealed and her appeal to the local committee was allowed. The appellant thereupon appealed under s. 111 (4) of the East African Income Tax (Management) Act, 1958. The main issue on appeal was whether at some time during 1958 a valid declaration of trust was made by the respondent. It was submitted on behalf of the respondent that she had at some time in 1958, not before June and not later than November, made a parol declaration of trust when giving instructions for the preparation of a deed of family arrangement by which she divested

herself of and vested in her children eight-ninths of the income of her late husband's estate and that such parol declaration was supported by the subsequent act of the respondent in entering into the deed which, it was argued, was completely consistent with that parol declaration. It was common ground that the deed was not executed until June, 1959, and that any instructions given for the preparation of the deed were so given by the respondent's son who was managing the affairs of the estate.

**Held –**

- (i) the court was not satisfied that the respondent had at any time in 1958 made a parol declaration of trust sufficient to confer upon her children an enforceable interest in the estate income, or indeed any declaration relating to that income.
- (ii) it was obvious that the son was not competent to make a parol declaration of trust on behalf of the respondent.
- (iii) in any event, it was clear from its terms that the deed did not purport to vest the estate in the respondent and the children, and further, none of the children could have enforced the supposed trust.

Appeal allowed. Decision of the local committee set aside.

**Cases referred to in judgment:**

- (1) *Godinho v. Commissioner of Income Tax*, [1960] E.A. 977 (U.).
- (2) *O. v. The Commissioner of Income Tax (Case No. 15)*, 1 E.A.T.C. 124.
- (3) *Bentley v. Mackay*, 51 E.R. 440.
- (4) *Allan v. Commissioner of Inland Revenue* (1925), 133 L.T. 9.

**Judgment**

**Slade J:** This is an appeal by the Commissioner of Income Tax under the provisions of s. 111 (4) of the East African Income Tax (Management) Act, 1958, against a decision of the local committee appointed under the provisions of s. 108 of the Act, which arises in the following way:

The respondent was on October 5, 1961, assessed under the Act for payment of tax on chargeable income for the year of income 1958, part of that chargeable income being an amount of £20,326 specified in the notice of assessment as “other income”. She disputed the assessment on the grounds that only one ninth of that sum should have been assessed upon her, she having in September, 1958, declared a trust whereby she became entitled to that proportion only of the income in question. The commissioner having refused to amend the assessment, she elected to appeal to the local committee, which allowed the appeal, its decision being in the following terms:

“On hearing the evidence of Mr. Holcom it is the opinion of the committee that there was a parol declaration of intention to create a trust by Mrs. Godinho on November 27, 1958, therefore the appeal is upheld.”

From that decision of the local committee the commissioner now appeals.

The facts are as follows:

The respondent is the widow of N.G., who died on March 6, 1952. Under the terms of his will, which was made in 1929, and by which the respondent and another (since deceased) were appointed executors and trustees, the respondent received the income from the residuary estate (hereinafter referred to as “the estate income”) so long as she remained the widow of the testator, and upon her death or re-marriage the trustees were enjoined to stand possessed of the residuary estate for the children of the marriage in equal shares as tenants in common. It is said that, prior to his death, the testator had expressed an intention of disposing of his estate equally between his widow and children, but however that may be, it is common ground that he did nothing to carry that intention into effect during his lifetime, whether by way of a settlement or by way of testamentary disposition.

Upon the death of N.G., it was found that the estate was in a parlous condition, and the second son, C.G., returned from England to undertake its management. It appears that the principal causes of embarrassment were the necessity of fulfilling the terms of a number of building covenants affecting certain interests in land, the property of the estate, and of paying a large sum by way of estate duty. Due to the skill and industry of C.G., the estate had been placed on a sound footing by the year 1958, and thereafter it was apparently possible to use the estate income for purposes other than the discharge of liabilities which had earlier been causes of embarrassment.

Now it appears that the respondent had, from time to time, expressed the desire that the estate income should be shared equally among all the members of the family, and until 1960 it was apparently believed by the members of the family that the respondent had made a valid declaration of trust in

respect of that income in favour of herself and the eight children. However, in that year, Sheridan, J., in *Godinho v. Commissioner of Income Tax* (1), [1960] E.A. 977 (U.), held that the respondent had failed to satisfy him that she –

“had made a declaration of trust on a particular date which had the automatic effect of divesting herself of the income of the estate and of investing her children with it so that from that date they had enforceable interests”.

That case was in respect of assessments raised against the respondent for the years of income 1955, 1956 and 1957.

It is common ground for the purposes of this appeal that the only issue I have to decide is whether at some time during 1958 a valid declaration of trust was made by the respondent which had the effect stated by Sheridan, J., in the passage quoted above in respect of the estate income to which she alone was entitled under the trusts of the will, and it is submitted by Mr. Bechgaard for the respondent, that such a declaration was made and took effect upon the giving of instructions for the preparation of a deed of family arrangement (hereinafter referred to as “the deed”).

I am unable to agree with Mr. Bechgaard’s submission that s. 113 (c) of the Act does not apply in the case of a commissioner’s appeal under s. 111 (4). It seems well settled that the onus lies on the taxpayer on any appeal under s. 111, and as has been said:

“It is not necessary for this court affirmatively to find that the facts were as the Crown alleged. It is only necessary to find that there is insufficiently good evidence to justify a finding for the taxpayer.”

See *O. v. The Commissioner of Income Tax* (Case No. 15) (2), 1 E.A.T.C. 124.

The deed had undoubtedly been executed by the respondent and by each of the children of N.G., deceased, by June 25, 1959. By the terms of the deed, the trusts of the will of the deceased were varied in such a way as to provide, broadly speaking, that as from its date, namely June 25, 1959, the trustees (the respondent and C.G.) stood possessed of the trust property upon trust to divide the estate income between the respondent and the eight children in equal shares until the respondent’s death or until the youngest child attained his majority, whichever event earlier occurred, and upon the happening of that event, to divide the trust property, capital as well as income, between the respondent, if she survived the attainment by the youngest child of his majority, and the children.

The evidence is clear that in June, 1958, Mr. Holcom of the firm of Hunter and Greig, advocates practising in Kampala, was approached on the question of winding-up the estate, when apparently he advised that a deed of family arrangement should be made, provided that the necessary consents could be obtained.

It is apparently the case that Mr. Holcom was first consulted on the matter by C.G., and that he subsequently discussed the matter with the respondent, C.G. and F.G., at the house of the respondent. His functions in June, 1958, were purely advisory, and there is no suggestion that he received instructions to prepare the deed at that time, whether from the respondent or from any other member of the family.

There is some conflict of evidence as to subsequent events in 1958. Mr. Holcom does not recall receiving any instructions for preparation of the deed until November 27, 1958, when he received such instructions in the course of a telephone conversation with C.G. C.G. gave evidence of the June conference, when he said that Mr. Holcom had advised on the necessity of obtaining consents



to the proposed arrangement, and the position of the younger son, then a minor, was discussed. He himself does not claim to have given instructions until November, 1958, the delay being apparently occasioned principally by the necessity of consulting all the other members of the family. He does, however, speak of receiving a draft deed in September, 1958, after which he apparently was occupied in obtaining the necessary consents from the other members of the family, some of whom were then in England. It is, however, clear from C.G.'s evidence that he did not give final instructions until November for the preparation of the deed. Mr. C. M. Shah, the accountant who attended to the G. affairs, also spoke of a draft deed in September and of a second draft in November or December. He produced for my inspection a draft deed clearly marked "Second Draft: 1.12.58" and bearing Mr. Holcom's initials. I think it possible that Mr. Holcom did produce a draft in September, 1958, possibly as a basis for C.G.'s discussions with other members of the family, and that after he received instructions from C.G. in November, 1958, he produced a final draft from which the deed was engrossed and handed to C.G. in March or April, 1959.

Those then are the facts upon which the sole issue in this appeal falls to be determined.

It is well settled that a trust can be created by any language which is clear enough to show an intention to create it – see 38 Halsbury's Laws of England (3rd Edn.), at p. 832.

In *Bentley v. Mackay* (3), 51 E.R. 440, Romilly, M.R., had this to say at p. 442:

"The second class is where a mere equitable owner, the legal right being vested in another person, is desirous that his trustee shall become a trustee for the object of his bounty. That is the present case; and the principle as settled by the reported cases is, that to give effect to such a gift the court requires clear and distinct evidence of a declaration of trust in favour of the donee; and for that purpose, it looks at the acts and writings of the donor, to see if from them clear evidence of a declaration of trust can be gathered. It is said that the acts must be unequivocal. That is in some sense true, but it means no more than this: that the evidence must be sufficient to satisfy the court that a declaration of trust has been made in favour of the party, and, when that is proved, the court will act on it."

What is said for the respondent is, as I see it, this: that at some time in 1958, not before June, probably in September, and certainly not later than November, the respondent made a parol declaration of trust when giving instructions for the preparation of the deed by which she divested herself of and vested in the objects of her bounty eight-ninths of the estate income, and that the fact that such parol declaration was made is supported by the subsequent act of the respondent in entering into the deed which, it is said for the respondent, is completely consistent with that parol declaration. It is clear that the deed itself did not create the trust, because it is not in dispute that it was not executed until June, 1959, and is not expressed to take effect until that time.

A parol declaration of trust was considered by the House of Lords in the case of *Allan v. Commissioner of Inland Revenue* (4) (1925), 133 L.T. 9. The facts in that case were, stated shortly, that Allan held shares in a company of which he was a director. At a directors' meeting in February, 1917, he informed the directors that he was holding the shares on trust and the transfer of the shares from him to himself and his wife as trustees was authorised. Prior to the meeting he had told his wife that the shares were to be transferred into their joint names as part of a trust fund and that until the transfer was completed he would himself hold the shares on trust. In March, 1917, an account was

opened in the company's books in his and his wife's name as trustees for their daughter, and from that date all dividends were paid into and accumulated in the account, neither he nor his wife receiving any part thereof, but owing to delays the shares remained in his name until March, 1919. It was held that he had not effectively divested himself of the shares or dividends thereon, by the creation of a valid trust, until the execution of a deed of settlement in April, 1919.

In that case, Lord Cave, L.C., said at p. 12:

"It is admitted that the deed did not create the necessary trust, partly because it was not executed until after the material period had elapsed and partly because by cl. 9 it was provided that the deed should not affect any trust property therein mentioned until the date of its becoming vested in the trustees, and the shares did not become vested in the trustees until some time in March, 1919. The whole case, therefore, turns upon the effect and meaning of the parol declaration found by the commissioners to have been made by the appellant to his wife. What, then, did that declaration mean? The exact terms of it are not given, and in this respect the statement of facts is somewhat vague and ambiguous. It is suggested on behalf of the appellant that the effect of the declaration was to create Mr. Allan a trustee of these shares for his wife and his daughter absolutely in equal shares. I do not think it is possible to put that interpretation upon the declaration. The appellant at that date had in his pocket or in his possession a draft settlement of these shares which he, as it is found, intended to make – a settlement which, whatever its exact form, was plainly inconsistent with a declaration of trust for his wife and daughter absolutely. Further, the fact that two years afterwards he executed a deed wholly inconsistent with any such absolute trust for the wife and daughter cannot be put out of account.

"Reading all the facts, as found by the commissioners, I do not think it possible to infer that he meant at this period, namely, in February, 1917, to declare an absolute trust for his wife and daughter. Moore, L.J., put a different interpretation upon the statement, for the thought that the intention and effect of the declaration was to impress the shares with a trust on the part of Mr. Allan legally to transfer them to the trustees as soon as he could do so. I am not sure that I entirely agree with that interpretation. It appears to me that, putting the matter as high as possible for the appellant, the declaration came to this, that the appellant in effect said to his wife, 'I intend to settle these shares upon you and our daughter; it may take some time to complete the settlement, but in the meantime until the settlement is made I will consider myself a trustee of the shares, that is to say, I will not deal with them as my own, and I will at the proper time transfer them to the trustees of the settlement upon the trusts which I may then declare'. I am not sure that that construction is right, but at all events it gives an intelligible meaning to the appellant's statement that he would hold the shares in trust and is consistent with the other facts of the case. But it is clearly not sufficient to enable the appellant to succeed in this appeal, for such a declaration left it open to him to frame and mould the trust at some future time as he might then think fit; it was not an immediate and complete declaration of trust, but merely a declaration of his intention to settle the shares and of his intention meanwhile to keep them in medio, so that they might be ready when the trust was effectively declared . . . I think that is the real meaning of the transaction, and, if so, there was plainly no definite established trust in February, 1917, or at any later time before the deed was executed. During that time the settlor was at liberty either to alter the draft deed or to change his mind and to make no settlement

at all, and neither his wife nor his daughter, nor anyone on their behalf, could, I think, have enforced the alleged trust.”

I am far from satisfied that the respondent at any time in 1958 made a parol declaration of trust sufficient to confer upon the children an enforceable interest in the estate income, or indeed any declaration relating to that income.

C.G. in evidence said:

“I believed at that time there was an existing declaration of trust by my mother. She had declared it time and time again. The first time was at my wedding two years after my father’s death.

“My belief continued until 1960 when I gave evidence in the earlier case.”

If it was the belief of C.G. that at all material times there was a subsisting declaration of trust in respect of income, it is, I think, a fair inference that that belief was shared by the respondent and by the other members of the family. Why then was it necessary to make a new declaration?

It is clear from Mr. Holcom’s evidence that at the time of his interview in June, 1958, with the respondent, she neither made a declaration of trust nor gave instructions.

It is argued that the declaration of trust was in fact made at the time of giving instructions in September, 1958, or at the latest when final instructions were given in November, 1958. Now it is clear that at no time were those instructions given by the respondent, and that the person concerned at all times with the winding-up of the estate, with the obtaining of the necessary consents to the new trust, and with instructions for the execution of the deed, was C.G. and no one else. It is obvious that he was not competent to make a parol declaration of trust on behalf of the respondent.

Now supposing it be argued (and I do not recall that it was) that the respondent made a parol declaration at some time in 1958, which is evidenced by the instructions received by Mr. Holcom, can it be said that those instructions, even assuming that they are correctly reflected by the deed itself, are entirely consistent with the terms of the supposed declaration and so provide clear evidence from which a declaration of trust can be gathered?

I accept Mr. Thornton’s submission that the deed must be read as a whole, and if it be read as a whole, it is clear from its terms that it does not purport to vest the estate income in the respondent and the children, without more.

The terms of settlement, stated in the simplest way, are that the estate income shall be divided among the respondent and the eight children and that the respondent shall, in return, obtain a benefit which she did not previously possess, namely, a share in the capital. To that surrender, by each of the children, of a proportion of his or her interest in the capital of the trust estate the consent of each such child was necessary, and it is clear that if any of those consents was not obtained, the proposed arrangement was at an end, and the respondent could have declined to proceed further with the matter of sharing the estate income, or could have shared it in some way other than that proposed. In that event, in my view, none of the children could have enforced the supposed trust.

For all the reasons I have attempted to state, I am not satisfied that the respondent in 1958 made a parol declaration of trust in respect of the estate income.

It follows that the appeal is allowed, and the decision of the local committee is set aside.

The appellant will have the costs of this appeal.

*Appeal allowed. Decision of the local committee set aside*

For the appellant:

*GE Thornton* (Deputy Legal Secretary, E.A. Common Services Organisation

*The Legal Secretary*, E.A. Common Services Organisation

For the respondent:

*K Bechgaard, QC* and *KG Korde*

*Korde & Esmail*, Kampala

**Njuguna s/o Karanja v R**  
**[1963] 1 EA 303 (SCK)**

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 19 October 1962                      |
| <b>Case Number:</b>      | 97/1962                              |
| <b>Before:</b>           | Rudd Ag CJ and Edmonds J             |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Criminal law – Vagrancy – Repatriation order – Appellant sentenced to imprisonment – Ordered for repatriation to his district thereafter – Appellant released after sentence outside district of repatriation – Appellant charged with returning after repatriation – Whether appellant guilty of offence – Whether appellant obliged to take himself to district of repatriation – Vagrancy Ordinance (Cap. 58), s. 4 (3) (K.).*

**Editor’s Summary**

The appellant had been sentenced to imprisonment and ordered to be repatriated to the Fort Hall district. On September 10, 1962, he was released from Manyani prison after serving the sentence and on arrival in Nairobi next day went to a police station to report that he would like to stay in Nairobi for three days in order to collect all his belongings. He was allowed four days and on the fifth day was arrested and charged with returning after repatriation contrary to s. 4 (3) of the Vagrancy Ordinance (Cap. 58), in that “he had left the Fort Hall district after his arrival therein”.

On appeal.

**Held –**

- (i) there was no obligation on a vagrant to return to his district of repatriation unless he had been allowed to leave on a condition to that effect which he had broken.

- (ii) if a vagrant is released by government outside his district of repatriation and not taken to it, he would not be guilty thereafter of an offence under s. 4 (3) of the Vagrancy Ordinance.

Appeal allowed. Conviction and sentence set aside. Re-trial ordered.

### **No cases referred to in judgment**

### **Judgment**

**Rudd Ag CJ:** read the following judgment of the court: Strange as it may seem the plea which records “I was repatriated to Fort Hall. I have no permit to return” is not an unequivocal plea of guilty in this case in the circumstances alleged in the petition of appeal. The appellant says he was released from Manyani Prison on September 10, 1962. Manyani is outside Fort Hall district. There is no obligation on a vagrant to return himself to his district of repatriation unless he has been allowed to leave on a condition to that effect which he has broken. The offence is leaving such a district.

If he were released by government outside that district and not brought back there we do not consider that he would be guilty thereafter.

In the circumstances we set aside the conviction and sentence and order a re-trial. We order that he be produced before a resident magistrate, Nairobi for re-trial.

*Appeal allowed. Conviction and sentence set aside. Re-trial ordered.*

The appellant in person.

For the respondent:

*GA Twelftree* (Crown Counsel, Kenya

*The Attorney-General*, Kenya

**Nurdin Bandali v Lombank Tanganyika Limited**  
[1963] 1 EA 304 (CA)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal   |
| <b>Date of judgment:</b> | 15 June 1963  |
| <b>Case Number:</b>      | 92/1962   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | High Court of Tanganyika – Mosdell, J                         |

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*[1] Hire-purchase – Clause requiring punctual payments – Late payments received from hirer – Late payments accepted – Whether right to repossess vehicle and terminate hiring waived – Whether hirer can plead estoppel – Instalments sent to hirer after hiring terminated and vehicle sold – Whether retention of moneys amount to representation by hirer that hiring subsists – Indian Evidence Act, 1872, s. 115.*

**Editor's Summary**

On May 17, 1960, the appellant and the respondent entered into a hire-purchase agreement in respect of a Mercedes-Benz truck. The price of the vehicle amounted to Shs. 60,308/- of which, on signing the agreement, the appellant made an initial payment of Shs. 14,300/-. The balance of Shs. 46,008/- was to be paid by seventeen monthly payments each of Shs. 2,556/- and one of Shs. 2,576/-, which included Shs. 20/- in respect of an option to purchase. The agreement contained clauses relative to punctual payment of instalments, interest on overdue payments, the right of the hirer to terminate the hiring on notice and the right to exercise the option to purchase if all sums due were paid and all terms, conditions and obligations observed. Clause 4 provided that, if the appellant should make any default in the due or

punctual payment of any instalment, the respondent should become entitled to terminate the hiring, without prejudice to its claim for arrears of and interest thereon, and in such event, without previous notice or demand (and notwithstanding any waiver of some previous default by the appellant) the respondent should become entitled to the immediate possession of the vehicle. Clause 7 provided that unless and until the whole of the sums payable under the agreement should have been paid to the respondent, the vehicle remained the absolute property of the respondent and by cl. 9 no forbearance, indulgence or relaxation shown or granted to the appellant was in any way to affect, diminish, restrict or prejudice the rights or powers of the respondent or constitute a waiver of any breach of the agreement. Of the payments made by the appellant fourteen out of sixteen were late and until the end of 1960, when a payment was in arrear, the practice of the respondent was to send first a reminder drawing attention to the overdue payment, and then a second reminder stating that, unless payment was made within seven days, the hiring would be terminated without further

notice and the vehicle repossessed, and if there was no response, to send a third letter stating the amount due and terminating the hiring. In 1961 the respondent ceased to send the second reminder, but continued to send the first reminder and the letter of termination. The appellant on a number of occasions received the first letter and on three occasions the termination letter, but in each case on payment of the arrears, the hiring was continued and in no case was the vehicle repossessed. The seventeenth instalment fell due on October 17, 1961, and was not paid in time. The appellant was sent a reminder and on November 13 he received a telegram saying that the instalment had not been received and that instructions had been given to repossess the vehicle. On November 18, 1961, the eighteenth and final instalment being a day overdue, a termination letter was sent to the appellant which stated that the arrears outstanding were Shs. 5,132/- which was the whole balance of the instalments including the Shs. 20/- payable on exercise of the option to purchase. On November 29, 1961, the vehicle was seized and the appellant's driver was informed that the vehicle would be released on payment of a sum of Shs. 5,332/- which sum included repossession charges. On November 30 one H, the appellant's agent, received a telegram from the appellant asking him to pay the respondent a cheque for Shs. 2,500/- and informing him that he had also posted a cheque for the same amount. Hirji wrote a note on the telegram inquiring from the respondent whether he could send a cheque for Shs. 2,500/- to which the respondent replied in the affirmative, but when the cheque was sent it was refused and Hirji was informed that the vehicle had been sold. On December 1 the appellant had, without the previous knowledge of the respondent, transferred to the respondent's account at Barclays Bank the sum of Shs. 5,300/- and a further sum of Shs. 1,500/- on December 4. Subsequently the appellant filed a suit alleging, *inter alia*, fraud, waiver and estoppel and claiming both general and exemplary damages. This suit was dismissed. On appeal the substantial points taken for the appellant were that the respondent was not entitled to repossess, on the grounds that a hire-purchase agreement was a contract of security and the right to possess was a penalty against which the courts would grant relief, that the respondent had waived its right to repossess as by its conduct time was no longer the essence of the contract, that the respondent could not unilaterally reinstate time as the essence, that the respondent had by its conduct estopped itself from asserting its right to repossess, that by receiving and retaining amounts which exceeded the sum demanded the respondent represented that the hiring still subsisted, that cl. 9 was contrary to public policy as it was contrary to s. 115 of the Indian Evidence Act in its application to estoppel and, as estoppel and waiver were closely interconnected, it would be contrary to public policy to allow cl. 9 to defeat an assertion of waiver.

**Held –**

- (i) the fact that all the instalments were paid by the hirer did not mean that the vehicle became his; until the property passed by reason of due exercise of the option, the vehicle remained the property of the owner who could, if he repossessed it in accordance with the terms of the agreement sell or otherwise deal with it.
- (ii) the hirer under a hire-purchase agreement has no interest in the article on hire other than that of a bailee and the owner may on default of payment of the hire charges terminate the bailment without the hirer being able to claim that there has been a forfeiture of any interest additional to that of a bailee.
- (iii) in view of cl. 9, it could not be said that because the respondent on a number of occasions forbore to exercise its right to repossess and accepted late payment it induced in the appellant a belief that the right to repossess would not be exercised.



- (iv) there was nothing in cl. 9 which was contrary to s. 115 of the Indian Evidence Act the submission that cl. 9 was invalid by reason of being contrary to the said section could not be sustained.
- (v) the respondent had not by its course of action estopped itself from asserting its right to repossess.
- (vi) had the amount of Shs. 5,332/- demanded by the agent when repossessing the vehicle been paid on November 29, 1961, the payment would have been treated as a payment made in accordance with the agreement and as that amount included all the instalments and the Shs. 20/- purchase price, the option would have been exercised and the ownership of the truck would have passed to the appellant.
- (vii) as the appellant knew that the truck had been repossessed and sold before the payments of Shs. 5,300/- and Shs. 1,500/- were made and received by the respondent, the court could not appreciate how the retention of these sums by the respondent could amount to a representation that the hiring was still subsisting; it was clear to both parties by December 1 at the latest not only that the hiring was no longer subsisting, but that it was not then possible to restore the hiring because the truck had been sold.

Appeal dismissed.

#### Cases referred to in judgment:

- (1) *Brooks v. Beirnsstein*, [1909] 1 K.B. 98.
- (2) *South Bedfordshire Electrical Finance Ltd. v. Bryant*, [1938] 3 All E.R. 580.
- (3) *Bridge v. Campbell Discount Co. Ltd.*, [1962] 1 All E.R. 385.
- (4) *Cramer v. Giles*, [1883] Cab. & El. 151.
- (5) *Financings Ltd. v. Baldock*, [1963] 1 All E.R. 443.
- (6) *Dawson's Bank Ltd. v. Japan Cotton Trading Co. Ltd.* (1935), A.I.R. P.C. 79.
- (7) *MacLaine v. Gatty and Another*, [1921] 1 A.C. 376; [1920] All E.R. Rep. 70.
- (8) *Darnley v. London, Chatham and Dover Railway Co.* (1867), L.R. 2 H.L. 43.
- (9) *Sarat Chunder Dey v. Gopal Chunder Laha* (1892), 19 I.A. 203.
- (10) *Forbes v. Ralli* (1925), 52 I.A. 178.
- (11) *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439.
- (12) *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1955] 2 All E.R. 657.

June 15. The following judgments were read:

#### Judgment

**Newbold JA:** On May 17, 1960, the appellant, who lived and carried on the business of a general merchant and transporter at Njombe, and the respondent, which was a limited liability company with a registered office at Dar-es-Salaam and carrying on hire-purchase business, entered into a hire-purchase agreement (hereinafter referred to as the "agreement") in relation to a Mercedes-Benz motor truck. The

total price of the truck, including certain accessories, insurance and the hire charges, amounted to Shs. 60,308/- and, in accordance with cl. 2 (*a*) of the agreement, the appellant on signing the agreement made an initial payment of Shs. 14,300/-, which was stated to be in consideration of the option to purchase contained in cl. 3 (*b*) of the agreement. This left a balance of hire of Shs. 46,008/- which, according to the agreement, was to be paid by seventeen monthly hire rentals each of Shs. 2,556/- and one monthly hire rental of Shs. 2,576/-, the first of such eighteen monthly hire

rentals commencing on June 17, 1960. By cl. 2 (b) of the agreement the appellant agreed “to pay punctually and without previous demand the monthly hire rentals” and by cl. 2 (c) he agreed to pay interest “on all overdue hire rentals . . . from the due date to the date of payment”. By cl. 3 (a) of the agreement the appellant was given the right at any time to terminate the hiring on notice and by cl. 3 (b) it was provided

“that if the hirer shall punctually pay the monthly hire rentals and all other sums due under this agreement and shall strictly observe and perform all the terms, conditions and obligations on his part contained in this agreement, he shall have the option to purchase the vehicle for the sum of Shs. 20/-”.

It is to be noted that this sum of Shs. 20/- appears to be included in the last of the instalments described as monthly hire rentals, by reason of which the last monthly hire rental was Shs. 20/- more than the previous seventeen and the total of such instalments Shs. 20/- more than the balance of hire of Shs. 46,008/-.

Clause 4, cl. 6, cl. 7 and cl. 9 of the agreement, in so far as they are relevant, read as follows:

“4. If the hirer –

(i) shall make any default in the due or punctual payment of any of the hire rentals . . .

. . . . .

then on the happening of any such event, without prejudice to their claim for arrears of monthly rentals or payment of interest . . . the owners may immediately terminate the hiring and they shall thereupon without previous notice or demand (and notwithstanding that they may have waived some previous default on the part of the hirer) become entitled to the immediate possession of the vehicle and to retake and resume possession of the same and the hirer shall thereupon no longer be in possession of the vehicle with the consent of the owners.

“6. In the event of the hirer returning the vehicle under cl. 3 (a), or in the event of the owners retaking possession of the vehicle under cl. 4, or in the event of this agreement being determined under cl. 5 hereof, the hirer shall pay to the owners (and in the event of this agreement being determined under cl. 5 hereof such liability shall be deemed for all purposes to have arisen on and immediately before, and not after, such determination):

(a) all arrears of rent . . . all interest thereon and all sums due and payable in the event of such return or retaking up to the date of the receipt of the vehicle by the owners and in the event of such determination up to the date of such determination of this agreement.

. . . . .

“7. Unless and until the whole of the sums due under cl. 2 (a) and cl. 2 (b) hereof shall have been paid to the owners, and the purchase of the vehicle shall have been made under cl. 3 (b) hereof, the vehicle shall remain the absolute property of the owners and the hirer shall not have any right or interest in the same other than as a mere bailee thereof.

“9. No forbearance, indulgence or relaxation on the part of the owners shown or granted to the hirer or in enforcing any of the terms or conditions of this agreement shall in any way effect, diminish, restrict or prejudice the rights or powers of the owners under this agreement or operate as or be deemed to be a waiver of any breach of the terms and conditions of this agreement on the part of the hirer.”

The appellant paid sixteen of the eighteen monthly hire rentals and fourteen of the sixteen payments were made late. Where a payment of a monthly hire rental was in arrear, it was, until the end of 1960, the practice of the respondent to send first a printed or cyclostyled reminder drawing attention to the fact that payment had not been made on time and then a second printed reminder stating that unless payment was made within seven days the hiring would be terminated without further notice and the vehicle repossessed. If this did not result in payment it was then the practice of the defendant to send a printed letter which had at the start the amount of arrears outstanding and the relevant parts of which continued as follows:

“We have received no response to our reminders for payment of the arrears as above, and your failure to remit this amount has caused a breach of the terms of the agreement you signed.

“We therefore, declare the hiring under the agreement terminated as and from the date of this letter and our property, as above, is no longer in your possession with our authority and consent.

“You are instructed therefore, to immediately deliver the vehicle . . . failing which, our representative will repossess without notice or delay.

“You will remain fully liable under the terms and conditions of the agreement signed . . .”

As from the beginning of 1961 the defendant ceased the practice of sending the second of such reminders but continued the practice of sending the first reminder and the subsequent letter of termination. The appellant on a number of occasions received the reminders and on three occasions the termination letter. The first of such letters was dated April 10, 1961, the second June 8, 1961, and the third August 14, 1961, but on payment of the arrears in each case the hiring was continued under the agreement and in no case was the vehicle repossessed.

The seventeenth instalment fell due on October 17, 1961, and was not paid in time. On some unspecified date the appellant received the reminder and on November 13 he also received from the respondent the following telegram:

“October Rental DSX 908 Not Received Stop Have Instructed Our Representative Repossess Soonest.”

On November 18, 1961, the eighteenth and final instalment being then a day overdue, a termination letter in the normal printed form referred to above was sent to the appellant. At the head of the letter it was stated that the arrears outstanding were Shs. 5,132/-, which amount was the whole of the balance of the hire rental, including the Shs. 20/- payable on the exercise of the option to purchase, due by the appellant to the respondent under the hire-purchase agreement and on the payment of which the property in the truck would automatically have passed to the appellant. This letter was received by the appellant on November 22, 1961. The appellant stated that on receipt of the letter he was frightened and sent some money, though what money is not clear.

Towards the end of November the appellant instructed an employee to take the truck to Dar-es-Salaam in connection with his business. The appellant alleged that he gave to the driver a sum of Shs. 5,500/- for the purchase of certain articles and that there were articles on the truck which belonged to the appellant and were not included within the hiring. On November 29, 1961, a representative of the respondent, a man called Hassanali, seized the truck in Dar-es-Salaam and stated that he would release it upon payment of the sum of Shs. 5,332/-, which sum was the amount of Shs. 5,132/- referred to above together with a sum of Shs. 200/- being repossession charges. The driver stated that he did not

have this sum and he and Hassanali went to the agent of the appellant in Dar-es-Salaam, a company of which Mr. Hirji was managing director. Mr. Hirji, with the agreement of Hassanali, immediately sent the following telegram:

“Lombank Seized Lorry Want Cheque Shs. 5,332/- Reply.”

On November 30 Mr. Hirji received the following telegram from the appellant:

“Give Lombank Shs. 2,500/- Already Post Cheque No. NJO 15636 Shs. 2,500/- On 26th.”

Mr. Hirji wrote on this telegram the following note:

“Lombank can I send you cheque for Shs. 2,500/-?”

The telegram with the note was sent to the office of the respondent shortly after 2 p.m. and was received back with the words “Yes, please do.” endorsed on the telegram with a signature and the stamp of the respondent. Mr. Hirji thereupon made out a cheque for the sum of Shs. 2,500/- and sent it to the respondent at about 2.45 p.m. but this cheque was refused by the respondent and was handed back to the messenger. On the morning of the 30th an officer of the respondent had informed a prospective purchaser that he could inspect the seized truck and at 2 p.m. that afternoon the prospective purchaser made an offer of Shs. 10,000/-, which offer was accepted about twenty minutes after it was made. It is to be noted that the truck was sold at about the same time that the respondent was informed of the telegraphic reply from the appellant and had stated that it was prepared to accept the cheque of Shs. 2,500/- from Mr. Hirji. Mr. Hirji, on being informed of the sale of the truck and being told by the manager of the respondent to tell the appellant to get in touch with the respondent, on November 30 sent a telegram to the defendant stating that the cheque had been refused and that the appellant should come immediately. On December 1 the appellant sent a telegram to the respondent reading as follows:

“Inform Reason Why You Sold My Truck Shs. 5,300/- Already Transferred Through Bank Reply.”

It appears that on December 1 the appellant had, without the previous knowledge of the respondent, by telegraphic transfer dated December 1 at Njombe but not received in Dar-es-Salaam until December 2, deposited to the account of the respondent at Barclays Bank, Dar-es-Salaam the sum of Shs. 5,300/-. On December 4 a further sum of Shs. 1,500/- was deposited by a Mr. Nanji on behalf of the appellant to the credit of the respondent at Barclays Bank, Dar-es-Salaam, with a statement that the amount had been received by Mr. Nanji for this purpose on November 28 but he had been unable to deposit it earlier. The fact of such deposits probably came to the knowledge of the respondent on December 3 and 5 respectively. On December 4 the appellant arrived in Dar-es-Salaam and saw the manager of the respondent who, after the appellant had asked for a list of the articles on the seized truck, instructed the appellant to get out. On December 6 a letter was written by the respondent’s advocate to the appellant’s advocate, the relevant parts of which are as follows:

“Your client, the hirer was in default and in arrears of his hire rentals for some time. Whereupon after sending the usual reminders demanding payment of the arrears, on November 18, 1961, our clients by a registered letter addressed to your client rightfully terminated the hiring of the said vehicle.

.....

“The vehicle was then traced in Dar-es-Salaam some time on Wednesday November 29, 1961, and after a due warning to the driver of the vehicle

it was repossessed at about 7 p.m. The hirer was given the whole of the 29th day of November, 1961, to produce the then owing sum of Shs. 5,300/-, but he failed to produce the same. . . . Further at no time on November 29, 1961, did your client offer to pay anything towards obtaining the release of the vehicle. There certainly was no understanding to release the vehicle on payment of the alleged sum of Shs. 2,500/-.

“The cheque for Shs. 2,500/- as alleged was tendered by your client after the sale of the vehicle on November 30, 1961, and having legally terminated the hiring and having sold the vehicle, their absolute property our clients were under no obligation to accept the cheque. (See cl. 6 and cl. 7 of the Hire-Purchase Agreement.)

“In the circumstances you would appreciate that your request for return of the vehicle is not only without any legal basis but futile.

. . . . .

“There is now a credit of Shs. 1,668/- in favour of your client in respect of his hire-purchase agreement made up as follows:

|  | <i>Debit</i>    | <i>Credit</i>    |
|--|-----------------|------------------|
| December 1, 1961: Balance owing under the Hire-Purchase Agreement .....                                      | Shs.<br>5,132/- |                  |
| December 2, 1961: Received by Barclays Bank D.C.O. ....  |                 | Shs.<br>5,300/-  |
| December 4, 1961: Paid by A. K. Nanji in favour of Lombank (for the account of your client) at B.B.C.O. .... |                 | Shs.<br>1,500/-  |
| By Balance c/d .....   | Shs.<br>1,668/- |                  |
|  | Shs.<br>6,800/- | Shs.<br>6,800/-  |
| By Balance b/d .....   |                 | Shs.<br>1,668/-” |

On about January 6, 1962, the appellant again visited the offices of the respondent and asked, *inter alia*, for an account and on the following day he was given an account which purported to show that after credit had been given for the sums of Shs. 5,300/- and Shs. 1,500/- deposited with Barclays Bank the appellant still owed to the respondent the sum of Shs. 2,737/-. In this account the appellant is debited with arrears of rentals which do not include the Shs. 20/- for the purchase price. The only other fact to which I need refer is that on a number of occasions the appellant had acted for the respondent in repossessing vehicles under other hire-purchase agreements.

On or about January 20, 1962, the appellant filed the plaint, and his pleadings were wide in the extreme, averring or alleging fraud, unconscionable bargain, undue influence, waiver, estoppel, trespass and detainee, and the appellant claimed both damages and exemplary damages. To the defence was attached yet a third statement of account from which it appears that the respondent acknowledged that the appellant was in credit to the extent of Shs. 1,550/- and this amount was paid into court. At the trial a large number of issues were framed and, save in respect of the claim for certain articles which had been on the truck at the time of seizure and which had not been returned to the appellant, the learned judge found in favour of the respondent on all the issues and dismissed the suit with costs. From this decision

the appellant appealed and his memorandum of appeal raised, with one exception, all matters which had been agitated in the High Court. The one exception was the value of the articles on the truck, from the judgment on which there has been no cross-appeal. At the hearing, Mr. Beynon, who appeared for the appellant, stated he would no longer proceed with the appeal relating to the claim in respect

of a sum of money alleged to have been on the truck at the time of seizure but which claim the learned judge had dismissed.

At the termination of Mr. Beynon's submissions we informed Mr. Reigels, who appeared for the respondent, that we did not wish him to address us on the questions of fraud, unconscionable bargain and undue influence, and I shall deal with those questions first. The learned judge in his answers to issues 21, 22, 23 and 24 found that there was no fraud, undue influence or unconscionable bargain and I see no reason to disagree with his decision on those issues. As regards fraud it was urged that the action of the respondent in waiting until the last instalment was due before terminating the hiring and seizing the vehicle conjoined with the different statements of account given by the respondent to the appellant and the extremely hasty sale of the truck after it had been seized, was evidence of fraud. I would accept that the circumstances in which the truck was sold displayed sharp practice on the part of the respondent, but I see nothing in the other allegations or the conduct of the respondent which would lead me to come to a decision contrary to that of the learned judge and hold that the respondent was guilty of fraud in its dealings with the appellant. As regards undue influence, it was urged that the respondent, by reason of its name incorporating the word "bank" and by reason of the fact that in effect it had provided money with the object of enabling the appellant to acquire the truck by means of a hire-purchase agreement, stood in a special relationship to the appellant and exercised undue influence over the appellant. I completely reject this submission. The appellant, as I have already stated, was a business man and I can see no reason at all why it should be suggested, merely because he enters into a hire-purchase agreement with a company carrying on hire-purchase business, that that company is in a position to dominate his will. As regards the unconscionable nature of the bargain, it was urged that this was evidenced by the fact that in the end the respondent had received all the amounts due under the agreement by way of rental and at the same time had obtained the truck and the proceeds of its sale. The position in which the hirer under a hire-purchase agreement may be liable for the full hire rentals and yet the owner may repossess the car had been envisaged by the courts in at least two cases. In *Brooks v. Beirnsstein* (1), [1909] 1 K.B. 98 it was held that an owner who had repossessed may nevertheless sue for arrears of hire rental. In the course of the successful submissions, Bigham, J., at p. 100 made the following comment:

"The result of your contention is that if the hirer is in default and the owner waits until the last instalment is due he may retake the goods and recover the whole of the price as well."

In *South Bedfordshire Electrical Finance Ltd. v. Bryant* (2), [1938] 3 All E.R. 580 it was held that an owner who had received payment for some and had obtained judgment for the balance of all the hire rental was nevertheless entitled to repossess the article. At p. 581 Greer, L.J., said:

"This is an unfortunate case, and, if we were entitled to exercise our judgment by reason of our sympathies with the unfortunate defendant, who may have to pay, or have judgment given against him for, the full amount of all the instalments, and at the same time is called upon to return the goods subject to the hiring agreement, we might think that there was a good deal to be said for the unfortunate defendant. Having become liable under a judgment to pay every one of the instalments provided for in the contract, he is now asked to deliver up the goods, to which, if he had effectually paid all the moneys provided for by the agreement, he would have become entitled as owner. Unfortunately, however, we have merely to consider the agreement between the parties, having regard to the facts that were before the judge."



I agree that at first sight, having regard to the object of a hire-purchase agreement, a position in which all the hire rentals are recovered and yet the vehicle is repossessed, would appear to be harsh in the extreme, but it must be borne in mind that a hire-purchase agreement is one in which the hirer does not obtain the ownership of the article until he has paid all the rental charges and has, in addition and in accordance with the agreement, exercised his option to purchase the vehicle. Accordingly, the fact that all the hire rentals have been paid by the hirer does not mean that the article becomes his, but it always remains, until the property has passed by reason of the due exercise of the option, in the ownership of the owner who can, if he repossesses it in accordance with the terms of the agreement, sell or otherwise deal with it. In other words, subject to any limitation on the right to repossess arising by reason of waiver, estoppel, or otherwise, the result which ensues is precisely what the parties agreed might ensue, even though they did not contemplate that it would ensue. I should like, with respect, to agree entirely with the following statement of Viscount Simonds, L.C., made in *Bridge v. Campbell Discount Co. Ltd.* (3), [1962] 1 All E.R. 385 at pp. 387 and 388:

“I must dissent, as Harman, L.J., did, from the suggestion that there is a general principle of equity which justifies the court in relieving a party to any bargain if, in the event, it operates hardly against him. In particular cases, e.g. of expectant heirs or of fiduciary relationship, a court of equity (and now any court) will, if the circumstances justify it, grant relief. So, also, if there is duress or fraud ‘which unravels all’. In the present case, there is nothing which would justify the court in granting relief to a hirer who exercised his rights under cl. 6.”

In the same case Lord Radcliffe at p. 397 said:

“ ‘Unconscionable’ must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plenitude of jurisdiction and the imprecision of rules that are attributed to ‘equity’ by their more enthusiastic colleagues . . . the courts of equity never undertook to serve as a general adjuster of men’s bargains . . . Even such masters of equity as Lord Eldon and Sir George Jessel, M.R., it must be remembered, were highly sceptical of the court’s duty to apply the epithet ‘unconscionable’ or its consequences to contracts made between persons of full age in circumstances that did not fall within the familiar categories of fraud, surprise, accident, etc., even though such contracts involved the payment of a larger sum of money on breach of an obligation to pay a smaller . . . ”

I turn now to the claims based on trespass and detinue. To succeed in trespass the appellant has to show that the respondent had no right to take the truck from the possession of the appellant and to succeed in detinue the appellant has to show that the respondent wrongfully refused the demand of the appellant for the return of the truck. In each cause of action this resolves itself into the question whether the respondent was entitled to repossess the truck on November 29 though, in the case of detinue, events subsequent to a lawful repossession might result in a wrongful refusal of the demand. Mr. Beynon admitted, as he must, that the appellant failed to pay the seventeenth and eighteenth instalments on the due dates, that is October 17 and November 17, and that on the face of it the agreement entitled the respondent to repossess the truck when an instalment was in arrear. He submitted, however, that the respondent was not entitled to exercise its right to repossess on the following grounds: first, that a hire-purchase agreement is a contract of security and the right to repossess is a penalty against which the courts will grant relief in equity;

secondly, that the respondent had waived its right to repossess as by its course of conduct it had made time no longer the essence of the contract and the respondent could not unilaterally reinstate time as of the essence; thirdly, that the respondent had by its conduct estopped itself from asserting its right to repossess. As regards the position subsequent to the repossession, Mr. Beynon submitted first, that the action of the respondent in demanding the balance of the hire rentals, including the Shs. 20/- purchase price, and accepting payment of these sums amounted to a representation that the hiring was still subsisting even if the truck had been lawfully seized; and secondly, that even if the hiring had been terminated, nevertheless the agreement was still subsisting and the appellant might, on tender of the balance due, exercise his option to purchase, that the appellant did this, and that the respondent in accepting the payment must be regarded as having sold the truck to the appellant. Submissions were also made in relation to damages.

Mr. Beynon's first submission, that a hire-purchase agreement is a contract of security similar to a mortgage and that the relief against forfeiture granted by equity in the case of a mortgage applies equally in the case of a hire-purchase agreement, stems from some dicta of Lord Denning in *Bridge v. Campbell Discount Co. Ltd.* (3), where at p. 398 he said:

"My lords, in order to determine this case it is as well to remember what is the nature of a hire-purchase transaction. It is in effect, though not in law, a mortgage of goods. Just as a man who buys land may raise part of the price by a mortgage of it, so also, a man who buys goods may raise part of the price by hire-purchase of them."

Proceeding from that point Mr. Beynon argued that the right to repossess is a penalty and that equity would not enforce a penalty, with the result that equity would restore to the hirer the article which was the subject of the hire-purchase agreement after it has been repossessed on the hirer tendering the arrears of the hire rentals the non-payment of which had resulted in the owner exercising his right to repossess. I do not accept that these words of Lord Denning were intended to have any such result, and it is to be noted that he specifically stated that in law a hire-purchase agreement was not a mortgage of goods. From the earliest days the rule laid down in *Cramer v. Giles* (4), [1883] Cab. & El. 151 that equity would not interfere to protect a hirer in default has been followed without any exception in so far as the owner's right to repossess is concerned. It is also to be noted that in a very recent case, *Financings Ltd. v. Baldock* (5), [1963] 1 All E.R. 443, Lord Denning seems to accept the right to repossess as a normal enforceable right, as at p. 445 he said:

"It seems to me that, when an agreement of hiring is terminated by virtue of a power contained in it and the owner retakes the vehicle, he can recover damages for any breach up to the date of termination . . ."

Whatever may be the ultimate object of the parties to a hire-purchase agreement, the essence of such an agreement is that, up to the last moment, the article is always the property of the owner and is merely on hire to the hirer. The hirer has no interest in the article other than that of a bailee and the owner may on default of payment of the hire charges terminate the bailment without the hirer being able to claim that there has been a forfeiture of any interest additional to that of a bailee. The converse is equally true and the hirer may on due notice terminate the hiring without being liable to pay the balance of any purchase price. Were it otherwise completely different consequences would flow from a hire-purchase agreement – such consequences, for example, as flow from a credit-sale agreement under which the property in the article passes immediately and the purchaser is liable for the full purchase price. I am satisfied, if it is established that there is a subsisting hire-purchase agreement and that the

owner has repossessed the article in accordance with the terms of the agreement for non-payment of the hire rental, that it is not open to the hirer to ask the court for an order that the article be restored to him on payment of the arrears due at the time of repossession nor, indeed, on payment of the full amount of the hire rentals due under the agreement together with any additional amount payable on exercise of the option to purchase. For these reasons I agree with the answer of the learned judge to issue 25, which answer was that forfeiture of the truck was not in the nature of a penalty in respect of which the appellant was entitled to relief.

The second submission was based on waiver and the third on estoppel. Before considering either of these submissions the distinction between waiver and estoppel should be clearly appreciated. Waiver is based on a contract, express or implied, between the parties. Thus it arises from a term, express or implied, of a contract, and before any such term can exist a valid contract must be established. If it is found that a contract is established and that it contains such a term, then that term, like any other term in a contract, may found a cause of action. Estoppel, on the other hand, is primarily a rule of evidence whereby a party to litigation is, in certain circumstances, prevented from denying something which he had previously asserted to be true. Estoppel, whether at common law or in equity, can never found a cause of action, though it may enable a cause of action, which would otherwise fail, to succeed. The difference between waiver and estoppel is set out in the judgment of the Privy Council in *Dawson's Bank Ltd. v. Japan Cotton Trading Co. Ltd.* (6) (1935), A.I.R. P.C. 79 at p. 82 as follows:

“These words, which are the true foundation of the judgment, disclose, in their lordships’ opinion, a confusion of thought upon the subjects of estoppel and waiver. The question of estoppel is governed by s. 115, Evidence Act, which for the present purpose seems to their lordships not to differ from the law in England in regard to estoppel in pais. Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal agrees to waive his principal’s rights then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver.”

These remarks appear to me to be related to the common law estoppel but they are equally applicable to the equitable estoppel.

Turning to the submissions relating to waiver, by cl. 2 (b) and cl. 4 (1) of the agreement the appellant undertook to pay the hire rentals punctually and the respondent was given the right to repossess in the event of default in the punctual payment of such rentals. In *MacLaine v. Gatty and Another* (7), [1921] 1 A.C. 376 Lord Birkenhead, L.C., said at p. 382:

“My lords, in a matter which would have seemed to me to be clear, had there not been a difference of judicial opinion in the courts below, I am of

opinion that where an instrument clearly expresses that payment is to be made punctually on a day specified, such a payment is not so made unless it is made upon that day.”

Since that case it has not, I think, been disputed that where a contract requires punctual payment then time is of the essence of the contract unless there is some other term which leads to a contrary conclusion. In cl. 2 (c) and cl. 9 of the agreement there are provisions relating to payment of interest on overdue hire rentals and to any forbearance not affecting the rights of the respondent. In the *Financings Ltd.* case (5), Diplock, L.J., said at p. 450:

“That time of payment is not of the essence of the contract is apparent from the provision in cl. (1) that interest at ten per cent. per annum shall be paid on all overdue instalments . . .”

If the learned lord justice meant by this statement to express the view that a provision for interest on overdue payments has per se the effect of completely altering the nature of a contract in relation to time then I am unaware of any authority or dicta in support of that view and, with respect, I consider that such a view may well fail to give effect to the contract as a whole. As I have already stated, the provisions of the agreement require punctual payment and give rights in the event of a default of such payment. It is clear from cl. 9 that a forbearance to enforce strictly the rights arising in the event of a default is not to be taken as affecting such rights. In other words, if a payment is not made on the due date the fact that the respondent does not immediately repossess the truck will not affect his right to do so. In the case of any such forbearance the appellant would have retained the use of the money overdue for payment and at the same time have had the benefit of the non-enforcement by the respondent of the right to repossess. In those circumstances where payment is subsequently made and accepted it would appear quite natural to insert a provision that interest should be paid on the overdue rental without thereby completely altering the requirement for punctual payment. I am of opinion therefore that originally time was of the essence of the agreement. I did not understand Mr. Beynon to make any submission to the contrary, his submissions being that the subsequent course of conduct of the respondent, either by reason of waiver or estoppel, had the result of ceasing to make time of the essence.

As time was originally of the essence of the agreement, to succeed on waiver the appellant must accordingly establish an express or implied contract made between the appellant and the respondent the terms of which were that the respondent did not require the payments of the hire rentals to be made punctually, and that it would not exercise its right to repossess if the appellant did not punctually pay the hire charges. There was certainly no express contract to that effect and before any contract can be implied the court must be satisfied that both parties to the contract intended the terms which are implied.

The learned judge in his replies to issues 1 and 2 has found that there was no such implied contract and no waiver of the right of the respondent to repossess the truck on default of punctual payment. There is nothing in the evidence which would lead me to a contrary conclusion and which would satisfy me that the respondent had consented to give up its rights to repossess. As Lord Cranworth said in *Darnley v. London, Chatham and Dover Railway Co.* (8) (1867), L.R. 2 H.L. 43 at p. 60:

“When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to shew, not merely what he understood to be the new terms on which the parties were proceeding,

but also that the other party had the same understanding – that both parties were proceeding on a new agreement, the terms of which they both understood.”

It is true that fourteen of the sixteen payments were made and accepted late and that on three occasions termination letters were sent but, on payment of the arrears, disregarded. These facts lead me to imply, on each occasion on which a late payment was accepted and the truck was not repossessed, a separate contract to the effect that the payment was accepted as a due payment under the agreement, that the agreement and the hiring thereunder was still subsisting and that any termination letter was withdrawn. Such a series of separate contracts on the occasion of each acceptance of a late payment would be precisely in accord with the provisions of cl. 9 and cl. 4 of the agreement, which clearly envisage the possibility of the respondent accepting a late payment without it affecting its rights. As the appellant agreed to a term which envisaged the possibility of such a course of conduct it is not open to him to ask the court to imply from this course of conduct an amending contract which removes his undertaking to make punctual payment and the respondent’s right to repossess. Mr. Beynon, however, submitted that cl. 9 and cl. 4 had no effect for the following reasons. In the case of cl. 9 he submitted that it related to individual acts and not to a course of conduct; that it did not apply to forbearance relating to default in the punctual payment of hire rentals as such forbearance was covered by cl. 4; and that in any event cl. 9 was contrary to public policy as it was contrary to s. 115 of the Evidence Act in its application to estoppel and, as estoppel and waiver were closely interconnected, it would be contrary to public policy to allow cl. 9 to defeat an assertion of waiver. The learned judge in his answers to issue 20 found against the appellant on each of these submissions and I entirely agree with his answers. There is nothing in cl. 9 which precludes it from applying to a course of conduct which arises from a series of individual acts of forbearance. Indeed, as it applies to each act of forbearance, it must equally apply to the course of conduct which consists of the aggregate of the individual acts of forbearance. Nor is there anything in cl. 9 which makes it inapplicable to forbearance in relation to default in punctual payment, as in terms it applies to forbearance in enforcing *any* of the terms or conditions of the agreement. The submission that cl. 9 is contrary to public policy is nothing other than a submission that it is contrary to public policy for a creditor to agree to give time to his debtor without prejudicing his rights, a proposition which only has to be stated to manifest its absurdity. As regards cl. 4, the submission was that as it referred to “some previous default” it could not refer to a number of defaults, a submission which, apart from any other objection, disregards the provisions of cl. 12 of the agreement to the effect that in construing the agreement words importing the singular shall include the plural.

As time was originally the essence of the agreement and as I consider that, by reason of cl. 9 and cl. 4, there has been no waiver of time, it is unnecessary to consider at this stage Mr. Beynon’s submission that time having been waived it could not unilaterally be restored as a term of the agreement. It may well be that where a provision in a contract as to time has been waived by an amending contract it would not be open to one of the parties to the contract unilaterally to reintroduce it in its original form. But where one party to a contract is in default for an unreasonable time it is always open to the other party to serve a notice requiring completion within a reasonable time; and such a notice, if in the circumstances it is reasonable, in effect unilaterally makes, or reintroduces, time as of the essence of the contract. For these reasons I reject the submissions that the respondent had lost its right to repossess the truck by reason of a waiver of such right.

As regards the submissions relating to estoppel, the facts upon which the appellant relies to found an estoppel are precisely the same as those which he submitted founded a waiver. The learned judge in his answer to issue 3 has found that the respondent was not estopped from asserting that time was of the essence of the agreement and that the seventeenth and eighteenth instalments of the hire rentals were not duly made. I have already come to the conclusion that the facts do not result in a waiver of the respondent's rights under the agreement, but it by no means follows that the same facts would not result in the respondent being estopped from asserting a right under the agreement. The essence of the difference is that in the case of waiver a contract, express or implied, must exist whereby the respondent agreed to give up or postpone its rights; whereas in the case of estoppel if the representations, by word or conduct, of the respondent were such as to induce the appellant to alter his position in the belief that the respondent's rights would not be asserted, then the respondent may be estopped from asserting those rights even though it never intended to give them up. Mr. Reigels submitted that the course of conduct on which the appellant relied, if it amounted to a representation, amounted at most to a representation of a promissory nature or a representation of a legal relationship. This being so, he submitted that it did not fall within s. 115 of the Evidence Act and that in Tanganyika the only type of estoppel in pais which could exist was the one covered by that section. Section 115 of the Evidence Act reads as follows:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative, to deny the truth of that thing.”

I agree that as the Evidence Act is designed to cover the whole field of the law relating to evidence then, unless the appellant can bring the matter within s. 115, no estoppel in pais would arise. I also agree that the representation relied on by the appellant was not the representation of an existing fact, which may found a common law estoppel, but the representation of a legal relationship, which may found an equitable estoppel. I am aware that it has often been said by the courts in India that the word “thing” in s. 115 means a statement of fact, but I am unaware of any decision binding on this court to the effect that s. 115 covers only the common law estoppel and does not include the equitable estoppel, a type of estoppel which was part of the law of England long before the Evidence Act was enacted. The word “thing” is a word of the widest ambit, capable of embracing either an existing fact or a present or future relationship, and I see nothing in s. 115 which leads me to the conclusion that the meaning of the word “thing” in that section should be restricted to an existing fact. In *Sarat Chunder Dey v. Gopal Chunder Laha* (9) (1892), 19 I.A. 203, Lord Shand in delivering the judgment of the Privy Council said at p. 215:

“The learned counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their lordships entirely adopt that view. . . . What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.”



This statement was endorsed in *Forbes v. Ralli* (10) (1925), 52 I.A. 178 where at p. 187 their lordships said:

“The exposition by Lord Shand in *Sarat Chunder Dey v. Gopal Chunder Laha* 19 I.A. 203, of the rule of equitable estoppel embodied in s. 115 of the Indian Evidence Act has been quoted in extenso in the judgment of the learned Chief Justice in the present case, and does not need repetition. Their lordships desire to record their full concurrence with the principle there laid down.”

The Indian Evidence Act was applied to Tanganyika long after the doctrine of equitable estoppel was clearly enunciated by Lord Cairns, L.C., in *Hughes v. Metropolitan Railway Co.* (11) (1877), 2 App. Cas. 439 at p. 448 in the following words:

“... but it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.”

As the Privy Council has held that s. 115 enacted in terms of the English law of estoppel, and as both the common law and equitable estoppel formed a part of the law of England at the time of the enactment of the Evidence Act, and as the fact that the representation of a legal relationship could ground an equitable estoppel had been clearly stated before the Evidence Act was applied to Tanganyika, I am satisfied that there is no reason to restrict the meaning of the word “thing” in s. 115 to an existing fact and that an equitable estoppel falls with the section.

The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it.

With this statement of the principle in mind did the respondent by its course of conduct clearly represent to the appellant that it would not require punctual payment and that it would not enforce its right to repossess, and did the appellant, believing this representation to be true, act upon it. In view of cl. 9 of the agreement, which envisaged acts of forbearance by the respondent, I cannot see how it can be said that because the respondent on a number of occasions forbore to exercise its right to repossess and accepted late payments it induced in the appellant a belief that the right to repossess would not be exercised. The appellant was aware that the respondent exercised its right to repossess in relation to other hirers and indeed the appellant acted as the respondent’s repossessing agent in a number of cases. The appellant concedes that if cl. 9 is valid then it could not be said that a course of conduct consisting of acts of forbearance would induce a belief that the right to repossess would not be exercised. But the appellant submits that cl. 9 is invalid for reasons I have already dealt with. In so far as it relates to any question of estoppel, he submits that it is also invalid because it is contrary to s. 115 of the Evidence Act in that it deprives the appellant of the benefit of that section. I confess to some difficulty in understanding how cl. 9 is contrary to s. 115. That section states that where a party has made a representation which another party believes to be true and

acts on it then the representation cannot be denied. Clause 9 says nothing contrary to that but merely states that acts of forbearance will not be taken to be a representation that the right to repossess will not be exercised. There is thus nothing in cl. 9 which is contrary to s. 115 and I reject the submission that it is invalid by reason of being contrary to s. 115.

As I have said, in view of the terms of the agreement and the fact that the appellant had acted as a repossessing agent on a number of occasions, I see nothing in the course of conduct of the respondent which induced the appellant to act on the belief that he need not make his payments punctually and that the respondent would not exercise his right to repossess. But even if the respondent had, by repeatedly accepting late payments as payments duly made under the agreement, induced the appellant to believe that the truck would not be repossessed on failure to pay the hire rental on the due date, it would nevertheless be open to the respondent, by giving reasonable notice to the appellant, to require payment of the overdue hire rentals and in default of such payment to repossess the truck. Mr. Beynon submitted that time could not be reintroduced into the contract by the unilateral act of one party. As I have already stated, where time has been removed from the contract by reason of waiver effected through an amending contract it may nevertheless be possible in effect to reintroduce it by a reasonable notice. In the case of an equitable estoppel, however, the right has never been removed from the contract but the owner of the right is prevented on equitable grounds from exercising it. It is a basic equitable principle that he who asks for equity must do equity. It would certainly not be equitable for an unalterable position to be created whereby the appellant could delay as much as he liked in his payments but the respondent had no effective remedy. If, therefore, the position can be restored to that which existed before the representation, it is only equitable that the terms of the agreement between the parties should be enforced. Thus, if the appellant had failed to pay punctually because the conduct of the respondent had led him to believe that the respondent would not repossess on default of punctual payment, it would nevertheless be the duty of the appellant to pay if the respondent gave reasonable notice requiring payment, in default of which the right to repossess would be exercised. That such is the law is clear from the decision in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* (12), [1955] 2 All E.R. 657 and I would refer in particular to the dicta of Viscount Simonds at p. 660 as follows:

“My lords, the decision of the Court of Appeal in the first action was based on nothing else than the principle of equity stated in this House in *Hughes v. Metropolitan Ry. Co.* (1877), 2 App. Cas. at p. 448 and interpreted by Bowen, L.J., in *Birmingham & District Land Co. v. London & North Western Ry. Co.* (1888), 40 Ch. D. at p. 286 in these terms:

‘It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.’

These last words are important, for they emphasise that the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights, and I do not wish to lend the authority of this House to the statement of the principle which is to be found in



*Combe v. Combe* [1951], 1 All E.R. at p. 770 and may well be far too widely stated.”

In this case not only did the appellant receive the usual reminder when he was in arrear with the instalment due on October 17 but on November 13 he received a telegram stating that instructions had been given to repossess the vehicle and on November 22 he received the termination notice, which, according to the appellant, frightened him. In spite of all these acts and notices on the part of the respondent the appellant did not make any payment before the truck was repossessed and pursued a course of action of paying as little as possible as late as possible. I thus reject the submission that the respondent had by its course of action estopped itself from asserting its right to repossess.

It is, however, the position subsequent to the repossession which has caused me some difficulty. The learned judge has dealt with this aspect of the case in his answers to issues 8, 9, 10, 11, 12, 13, 14, 15, 16, 18 and 19. The sum total of his answers to these issues is that no act of the respondent amounted to a representation that the hiring was still subsisting, that the payments were not made in the belief that the hiring was still subsisting, that the purchase price of Shs. 20/- had been erroneously debited by the respondent to the appellant and that the appellant had not validly exercised his option to purchase the truck.

I think it clear that had the amount of Shs. 5,332/- demanded by the agent repossessing the truck been paid on November 29, the payment would have been treated as a payment made in accordance with the agreement and, as that amount included all the hire rentals and the Shs. 20/- purchase price, the option would have been exercised and the ownership of the truck would have passed to the appellant. Mr. Beynon submitted that the act of the respondent, in demanding in the termination letter and through the repossessing agent payment of a sum which included the Shs. 20/- purchase price and in subsequently receiving and retaining amounts which exceeded the sum demanded, amounted to a representation that the hiring still subsisted. The corollary to this submission, presumably, was that if the hiring still subsisted the respondent had no right to sell the truck. The fact is that even after the appellant had been informed that the truck had been repossessed he continued the policy of proceeding along the edge of disaster by paying as little as possible, and it was only when he realised that he had toppled over the brink and that his truck had been sold that he made payments which in fact were more than the amount either due or demanded at the time of repossession. Although there is no finding of the learned judge on this point, it is a fair inference from the evidence that on December 1 the appellant knew that this truck had been sold; and it was after such knowledge that payments of Shs. 5,300/- and Shs. 1,500/- were made to the respondent. As the appellant knew that the truck had been repossessed and sold before these payments were made and received by the respondent, I fail to appreciate how the retention of these sums by the respondent could amount to a representation that the hiring was still subsisting. It was clear to both parties by December 1 at the latest not only that the hiring was no longer subsisting, but that it was not then possible to restore the hiring because the truck had been sold. It may well be that the appellant paid the sums in question in the vague hope that the respondent would be able to reacquire the truck and then restore the hiring, but at the most this could not have been more than a vague hope on the part of the appellant. As I have said, I consider that the respondent was guilty of sharp practice in selling the truck in the circumstances in which it did. It may well be that had the appellant instructed Mr. Hirji to pay the full sum demanded and such payment had been tendered by the afternoon of November 30 the respondent would have been in some difficulty by reason of having already sold the truck. However, this did not

happen as the appellant had pursued his previous policy of failing to make full payment on time. In my view if the truck had not been sold but had, after repossession, remained in the possession of the respondent then, if the respondent, having made a demand for a sum which included both the hire rentals in arrears and the amount of the Shs. 20/- purchase price, had accepted payment of a sum which covered the full amount of such demand, such acceptance would have amounted to an acceptance of the position that all the hire rentals, together with the amount of the purchase price payable on the exercise of the option, had been duly paid in accordance with the agreement, that the terms of the agreement were still subsisting and that the property in the truck accordingly passed to the appellant. In fact, however, it did not lie within the power of the respondent when it accepted the payments to transfer the ownership of the truck and the appellant at the time that he made the payments knew that the respondent could not transfer the property in the truck. Accordingly, in my view, the fact that the respondent in the letter from its advocate purported to apply the sums paid not only to the arrears of hire rentals, which it could properly do, but also to an alleged debt of Shs. 20/- would have no result in law and could not be anything other than a patent mistake. Mr. Beynon argued that the appropriation of the money to this debt amounted to a representation that the hiring was still subsisting. As I have stated, the truck to the knowledge of the appellant, had been previously sold and I fail to see how any act of the respondent can be said to be a representation of a position when such position is known not to exist. In any event an amount can only be appropriated to a debt if a debt exists. The debt of Shs. 20/- could only be created by the appellant exercising his option to purchase after due payment of the hire rentals. In fact the truck was repossessed and sold before the circumstances existed in which the debt could be created. In other words, the debt never came into existence and thus it was not possible for the respondent to appropriate a sum of money to a debt which did not exist.

I cannot accept, therefore, that the act of the respondent in debiting the appellant with an amount which included a purported debt of Shs. 20/- and in accepting a sum in excess of the amount debited had any effect in the circumstances of this case; and it certainly cannot be taken to be a representation of a position which each party knew did not exist. Further, it is not clear to me what action the appellant took in reliance of the truth of the statement in the advocate's letter of December 6. I agree with the submission that even if the hiring is terminated the agreement may still subsist; indeed the terms of the agreement make this clear. This does not mean, however, that it remains open to the appellant to exercise his option to purchase as, if the hiring is terminated by reason of the default of the appellant, the appellant in the terms of the agreement loses his right to exercise the option, though, of course, there is nothing to prevent the respondent from restoring that right.

For these reasons in my view the appellant was not entitled to succeed in his claims based on either trespass or detinue and there is thus no necessity to consider the submissions relating to damages.

I would accordingly dismiss the appeal with costs.

**Sir Ronald Sinclair P:** I agree and have nothing to add. The appeal is dismissed with costs.

**Sir Trevor Gould Ag V-P:** I also agree.

*Appeal dismissed.*

For the appellant:

*AC Beynon, DK Barot and NZ Karzan*

*DK Barot, Dar-es-Salaam*

For the respondent:

*MD Riegels*

*Dodd & Company, Dar-es-Salaam*

**Nzia s/o Maindi v R**  
**[1963] 1 EA 322 (SCK)**

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 16 October 1962                      |
| <b>Case Number:</b>      | 872/1962                             |
| <b>Before:</b>           | Rudd Ag CJ and Edmonds J             |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Criminal law – Practice – Plea – Equivocal plea – Appellant repatriated – Permit to return to Nairobi to look for employment – Permit expired – Whether “I was repatriated. I have a permit to return” is an unequivocal plea of guilty – Vagrancy Ordinance (Cap. 58), s. 4 (3) (K.).*

**Editor’s Summary**

On April 26, 1960, the appellant was repatriated to Kitui. On June 27, 1962, he was issued with a permit to look for employment in Nairobi which he alleged was his place of residence though he was born in Kitui. He did not find employment within the period stated in the permit and was subsequently charged with returning after repatriation contrary to s. 4 (3) of the Vagrancy Ordinance (Cap. 58). In his plea he said “I was repatriated. I have a permit to return”, and produced the permit. This was treated as a plea of guilty and he was convicted thereon and sentenced to two years’ imprisonment and ordered to be repatriated.

On appeal,

**Held –**

- (i) the plea was not an unequivocal plea of guilty and the appellant was convicted without a trial.
- (ii) the original and all subsequent orders were wrongly made since they ordered the appellant’s repatriation to a place where he did not have a home.

Appeal allowed. Conviction and sentence set aside.

**No cases referred to in judgment**

**Judgment**

**Rudd Ag CJ:** read the following judgment of the court: The plea is not an unequivocal plea of guilty.

The magistrate has derogated from it and convicted without trial.

We would add that it would seem that the original order of April 26, 1960, for repatriation was wrongly made and all subsequent orders for repatriation were also erroneous since they ordered his repatriation to a place where he did not have a home.

Appeal allowed. Conviction and sentence set aside. Appellant acquitted.

*Appeal allowed. Conviction and sentence set aside.*

The appellant in person.

For the respondent:

*GA Twelftree* (Crown Counsel, Kenya)

*The Attorney-General*, Kenya

## **Attorney-General v Godfrey Katondwaki** [1963] 1 EA 323 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 10 January 1963                 |
| <b>Case Number:</b>      | 619/1962                        |
| <b>Before:</b>           | Sheridan, Jones and Slade JJA   |
| <b>Sourced by:</b>       | LawAfrica                       |

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[1] *Constitutional law – Protectorate – Agreement between Crown and African ruler – Ankole agreement – Ankole agreement not given force of law by proclamation – Agreement expiring upon independence – Appointment of Electoral Boundary Commissioner pursuant to Ankole agreement – Status of protectorate altered by independence – Provisions for appointment of Electoral Boundary Commissioner in Uganda (Independence) Order-in-Council, 1962 – Action for declaration that Commissioner is to be appointed under the Uganda (Independence) Order-in-Council, 1962 – Civil Procedure (Constitution Cases) Act, 1962 (U.) – The Ankole Agreement, 1962, art. 6 (3) and Third Schedule, art. 18, art. 19 and art. 20 (U.) – Legislative Council (Elections) Ordinance, 1957 (U.) – Uganda (Independence) Order-in-Council, 1962, s. 5, s. 8 and Schedule 2, para. 18 – Uganda (Constitution) Order-in-Council, 1963, s. 4 – Uganda Independence Act, 1962 – Foreign Jurisdiction Act, 1890 – Ankole Agreement, 1901 (U.) – District Administration (District Councils) Ordinance, 1955 (U.) – Eishengyero of Ankole Constitutional Regulations, 1955 (U.).*

### **Editor's Summary**

The plaintiff sued for declarations that the appointment of an Electoral Boundary Commissioner for the Kingdom of Ankole should be in accordance with the Uganda (Independence) Order-in-Council, 1962; that the defendant had no right or authority to exercise the powers or perform the duties of Electoral Boundary Commissioner and for an injunction to restrain the defendant from such exercise or

performance. On October 6, 1962, the defendant was by letter appointed to his office pursuant to the Third Schedule to the Ankole Agreement, 1962. Prior to this appointment the Omugabe informed the Governor by letter that he was appointing the defendant to the office and the Governor replied advising that the appointment should be deferred until the new constitution came into force. On October 8, the defendant produced a report stating that he had demarcated the fifty-five constituencies. The defendant admitted that he had continued to act as Electoral Boundary Commissioner until November, 1962, and there was evidence that he had exercised the powers and performed the functions of his office so as to revise his report and to bring it more into conformity with art. 20 (2) of the Third Schedule to the Ankole Agreement. It was common ground that the Ankole Agreement, 1962, had not been made law by proclamation as provided by s. 4 of the Uganda (Constitution) Order-in-Council, 1962, although it was published in the Legal Supplement to the Uganda *Gazette*. The plaintiff's case was that the purported appointment was not made under provisions having the force of law; that even conceding the validity of the original purported appointment, it ceased to be of effect immediately prior to October 9, 1962, owing to the expiration of the Ankole Agreement, 1962, and that the defendant had not been appointed Electoral Boundary Commissioner under the provisions of Schedule 2 to the Uganda (Independence) Order-in-Council, 1962. For the defendant it was submitted that he was validly appointed, and as such was entitled to exercise the powers of his office, and that his appointment continued and was valid notwithstanding that the Ankole Agreement, 1962, ceased to have effect on October 9, 1962.

**Held –**

- (i) the exchange of letters in September and October, 1962, between the Omugabe of Ankole and the Governor amounted to a consultation with the

Governor as required by art. 19 (4) of the Third Schedule to the Ankole Agreement, 1962.

- (ii) the Ankole Agreement, 1962, was in the nature of a treaty and unless incorporated within the municipal law of Uganda, its provisions did not confer rights or impose duties which are justiciable and enforceable by the courts.
- (iii) publication of the Ankole Agreement, 1962, in the Legal Supplement of the Uganda *Gazette* did not give the agreement the force of law.
- (iv) the municipal law applicable to the appointment of the Electoral Boundary Commissioner is contained in Schedule 2 to the Uganda (Independence) Order-in-Council, 1962, and the defendant's appointment as Electoral Boundary Commissioner of the Kingdom of Ankole was not in accordance with the Constitution.

Declarations and injunction granted as prayed in plaint.

#### **Cases referred to in judgment:**

- (1) *Daudi Ndibarema v. Enganzi of Ankole*, [1960] E.A. 47 (C.A.).
- (2) *Nyali Ltd. v. Attorney-General*, [1956] 1 Q.B. 1; [1956] 2 All E.R. 689.
- (3) *Sobhuza II v. Miller and Others*, [1926] A.C. 518.

#### **Judgment**

**Sheridan J:** read the following judgment of the court: This suit, which was heard by three judges of the High Court in accordance with the provisions of the Civil Procedure (Constitutional Cases) Act, 1962, is one in which the plaintiff, the Attorney-General of Uganda, sues the defendant, who claims to be the Electoral Boundary Commissioner for the Kingdom of Ankole, for:

- 1. a declaration that the Electoral Boundary Commissioner for the Kingdom of Ankole is to be appointed under para. 18 of Schedule 2 to the Constitution of Uganda which was brought into force on October 9, 1962, by the Uganda (Independence) Order-in-Council, 1962, and not otherwise;
- 2. a declaration that the defendant has no right or authority to exercise the powers or perform the duties of the Electoral Boundary Commissioner;
- 3. an injunction to restrain the defendant from exercising those powers or performing those functions.

By his defence, the defendant claims:

- 1. that he was validly appointed by the Omugabe on October 6, 1962, pursuant to art. 19 and art. 20 of the Ankole Agreement, 1962;
- 2. that in accordance with those provisions he delimited the constituencies of the Kingdom of Ankole before the Ankole Agreement, 1962, expired immediately before October 9, 1962;
- 3. that his appointment continued to be valid after October 9, 1962, notwithstanding the expiry of the Ankole Agreement, 1962, as it is not expressly stated in the constitution that it is intended to have a retrospective effect;
- 4. that para. 18 and para. 19 of Schedule 2 to the constitution refer to future but not past appointments which were properly made prior to October 9, 1962.

The reference throughout the statement of defence to art. 19 and art. 20 of the Ankole Agreement was incorrect, and it is clear that the defendant intended to refer to art. 19 and art. 20 of the Third Schedule to the agreement (the Constitution of Ankole). We have considered the defence as if it had been amended by the substitution of the correct reference for the incorrect reference.

Stated shortly, it is the plaintiff's case that the defendant performed certain acts as Electoral Boundary Commissioner, both before and after October 9, 1962, by virtue of an appointment purporting to have been made under the provisions of the Third Schedule to the Ankole Agreement, 1962 (the Constitution of Ankole), that that purported appointment was not made under provisions having the force of law, that even conceding the validity of the original purported appointment, it certainly ceased to be of effect immediately prior to October 9, 1962, and that the defendant has not been appointed Electoral Boundary Commissioner under the provisions of Schedule 2 to the Constitution of Uganda (Special Provisions relating to Ankole).

The defendant's case is that he was validly appointed commissioner, and as such was entitled to exercise the powers of the office, and that the appointment continued to have validity notwithstanding that the Ankole Agreement, 1962, ceased to have effect on October 9, 1962.

It will be convenient to refer to the Ankole Agreement, 1962, as "the Agreement", to the Third Schedule to the Agreement as "the Ankole Constitution", and to the Uganda (Independence) Order-in-Council, 1962, as "the Independence Order".

The Agreement, it was expressed to come into force on August 30, 1962, and the relevant provisions of the Ankole Constitution are:

1. Article 18, which provided that the Eishengyero (the Legislative Assembly of Ankole) should consist, *inter alia*, of fifty-five elected members.
2. Article 19, which was in the following terms –
  - "19. (1) The Omugabe shall, as soon as practicable after the coming into force of the article and wherever it shall be necessary for the review of the boundaries of constituencies, appoint an Electoral Boundary Commissioner.
  - (2) The Electoral Boundary Commissioner shall be an independent and impartial person and, in the discharge of his functions under the constitution shall not be subject to the direction or control of any other person or authority.
  - (3) The Electoral Boundary Commissioner shall be appointed for such period as may be agreed between the commissioner and the Omugabe as being necessary for the performance of his functions under art. 20 of this Constitution and during that period he shall not be removed from office by the Omugabe except for inability to discharge the functions of his office (whether arising from infirmity of mind or body or from any other cause) or for misbehaviour.
  - (4) Before tendering advice to the Omugabe as to the appointment of any person to be Electoral Boundary Commissioner the Enganzi shall consult the leader of the principal party in opposition in the Eishengyero, and before any appointment is made, the Omugabe shall consult the Governor."
3. Article 20 (1) and (2), which was in the following terms:
  - "20. (1) For the purposes of election to the Eishengyero, Ankole shall be divided into as many constituencies as there are elected members of the Eishengyero in such manner as the Electoral Boundary Commissioner may determine.



- (2) The boundaries of each constituency shall be such that the electorate is, as far as practicable, equal in all constituencies.
- (3) . . . . .”

The suit raises issues both of fact and of law and we first consider the facts.

On September 14, 1962, Mr. Kabaireho (D.W. 2), the Enganzi (Chief Minister), took initial steps to secure the appointment of an Electoral Boundary Commissioner by the Omugabe. In accordance with art. 19 (4) of the Ankole Constitution, he contacted Mr. Bananuka (P.W. 1), the Leader of the Opposition in the Eishengyero in order to consult him over the proposed appointment. There is a conflict of evidence as to how far this consultation went. Mr. Bananuka says that it proved abortive, whereas Mr. Kabaireho says that they both produced two names, the defendant being one of his nominees. At that time the defendant was Assistant Chief Judge in the Kingdom. Mr. Bananuka suggested that they should refer the matter to the Omugabe, but Mr. Kabaireho declined, and said that he was merely consulting Mr. Bananuka as Leader of the Opposition. Mr. Kabaireho went to the Omugabe, accompanied by Mr. Mutasherwa (D.W. 3), the Omulamuzi. After a discussion in which Mr. Kabaireho says that he recommended the defendant for the appointment, the Omugabe said that he would appoint the defendant. On September 15, 1962, Mr. Kabaireho wrote a confirmatory letter to the Omugabe (exhibit 8). On September 17, 1962, the Omugabe replied (exhibit 9), that he had selected the defendant.

The wording of these letters might suggest that the final choice had been left with the Omugabe, but here we accept Mr. Kabaireho’s testimony that he in fact recommended the defendant to the Omugabe at the interview on September 14, 1962, and that the Omugabe followed the advice which had been tendered to him.

On September 15, 1962 – that is, before the date of the letter, exhibit 9 – the Omugabe had written to the Governor (exhibit 10), informing him that he was appointing the defendant. Although the Governor, by his reply dated October 2, 1962 (exhibit 11), advised the Omugabe to wait until the new Constitution came into force, this exchange of letters amounted, in our view, to a consultation with the Governor. On this evidence we are satisfied that art. 19 (4) of the Ankole Constitution was complied with.

Meanwhile, on September 15, 1962, the Omugabe had written to the defendant (exhibit 3), informing him of his impending appointment. The letter went further and amounted to a de facto appointment. As the Agreement was due shortly to expire, the defendant was exhorted to have the material for delimiting the constituencies ready by the time he was officially appointed. This was done by the letter dated October 6, 1962 (exhibit 2). It set out art. 19 and art. 20 of the Ankole Constitution, and although it states that the report should be ready about the end of October, this was clearly contrary to the understanding that the defendant was working to a date line of October 8, 1962. In fact, the defendant produced a report on that date (exhibit 7). In it, the defendant states that he had demarcated the fifty-five constituencies with the help of the 1959 population census. This resulted in an uneven distribution of the electorate between the constituencies, one constituency exceeding 17,000 electors, while another contained less than 2,000; therefore it cannot be said that the boundaries proposed in the report for each constituency were such that the electorate in each was “as far as practicable equal” as prescribed by art. 20 (2) of the Ankole Constitution. The defendant’s task was not an easy one, as his successor may well discover, but a better yardstick would have been the register of electors for the polling divisions in the electoral districts of Ankole compiled under the Legislative Council (Elections) Ordinance, 1957



However, we would like to make it clear that, in these proceedings, we were not asked to pronounce upon the validity of the report.

The defendant admits that he continued as Electoral Boundary Commissioner until November 28, 1962, but he would have us believe that he did not exercise any of the functions of that office after October 8, 1962. On this, the documentary evidence, consisting of the defendant's mileage and night allowance claims and his signature in the visitors' book at a Gombolola headquarters (exhibits 1, 5 and 6), all point the other way. Although Mr. Kabaireho denies it, it is a reasonable inference that the purpose of the defendant's tour of the Kingdom after October 8, 1962, was to revise his report so as to bring it more into conformity with art. 20 (2) of the Ankole Constitution.

Even conceding that the appointment under the Ankole Constitution was valid, it is clear that by para. 18 of Schedule 2 to the Constitution of Uganda the Omugabe was enjoined to appoint an Electoral Boundary Commissioner. The relevant provisions of para. 18 are as follows:

- 18.(1) The Omugabe shall, as soon as practicable after the coming into force of this Schedule and whenever it shall be necessary for the review of the boundaries of constituencies, appoint an Electoral Boundary Commissioner.
- (2) . . . . .
- (3) . . . . .
- (4) In the exercise of the powers conferred on him by this paragraph the Omugabe shall act in accordance with the advice of the Electoral Commission of Uganda."

This provides an answer to the submission of Mr. Kazzora, who appeared for the defendant, that the Attorney-General, representing the Government of Uganda, had no standing in the matter, on the grounds, if we understood him correctly, that being Attorney-General to a Government which was not a party to the Agreement he was entitled neither to sue or be sued under that agreement.

This argument can shortly be disposed of; it is abundantly clear that whatever the Attorney-General's right of instituting suits in this court may or may not be, he is not in this instance suing on any provision of the Agreement. There are therefore no merits in Mr. Kazzora's submissions in this respect and we dismiss them from consideration.

There can be, and indeed there is, no dispute between the parties that the Agreement was made between the Governor of what was then the Uganda Protectorate for and on behalf of Her Majesty the Queen of the one part and the Omugabe of Ankole on behalf of the Eishengyero and People of the Kingdom of Ankole of the other part, and was intended to subsist until, and only until, the end of the state of protection then existing. That state of protection came to an end by virtue of the Uganda Independence Act, 1962, at midnight on October 8, 1962, immediately after which the provisions of the Constitution of Uganda set out as a Schedule to the independence order came into force.

The Third Schedule to the Agreement purports to set out in detail a Constitution of Ankole, and by art. 6 (3) of the Agreement itself Her Majesty's Government undertook to take the necessary steps to give that Constitution the force of law as part of the Constitution of Uganda.

There can be no question of acquired rights under the Agreement subsisting after October 9, 1962, except in so far as any such rights might have been given effect to by the Constitution of Uganda, and Mr. Kazzora had to concede that the defendant's appointment was not an existing office which was preserved by

s. 5 of the Independence Order. In so far as it is necessary to decide the point, we agree with Mr. Kazzora's submission that the Constitution of Uganda had no effect prior to October 9, 1962, but would add that the submission appears to have no relevance to the issues raised.

At all material times prior to October 9, 1962, the Constitution of Uganda (hereinafter referred to as the "earlier Constitution") was that set out in the Second Schedule to the Uganda (Constitution) Order-in-Council, 1962, which was made under powers conferred by the Foreign Jurisdiction Act, 1890, and which came into operation on March 1, 1962. By s. 4 of the Order, all existing laws had effect as if they had been made in pursuance of the Order, and the term "existing laws" was expressed to mean all Ordinances, laws, rules, regulations, orders and other instruments made or having effect as if they had been made under Orders-in-Council, previously in existence and having effect as part of the law of Uganda or any part thereof immediately before March 1, 1962. At that time there was in existence an earlier Ankole Agreement, namely that of 1901, as from time to time amended, but there is no dispute that this did not have the force of law in any part of Uganda. See *Daudi Ndibarema v. Enganzi of Ankole* (1), [1960] E.A. 47 (C.A.).

It is clear then, that the Ankole Agreement, 1901, was not an existing law for the purposes of the earlier Constitution. On the other hand, the District Administration (District Councils) Ordinance, 1955, which had been made under the previously existing constitutional instruments, and the regulations made under that Ordinance, were existing laws for that purpose. The relevant regulations for the purpose of this suit are the Eishengyero of Ankole Constitutional Regulations, 1955, as from time to time amended. By s. 8 (1) and (3) of the Independence Order, these regulations continue to apply and the existing Eishengyero is kept in being until February 28, 1963, unless it be earlier dissolved.

By s. 4 of the earlier Constitution, provision was made to enable the Governor in his discretion to declare that any provision of any agreement between Her Majesty and, *inter alia*, the Ruler of the Kingdom of Ankole, should have the force of law, the effect of any such declaration being expressed to be that any such provision so declared should have the same force and effect as if it had formed part of the earlier Constitution. We were informed from the Bar that no provision of the 1901 agreement or of the 1962 agreement had been the subject of any such declaration.

It cannot, we think, on the present state of the authorities, be disputed that the Agreement is in the nature of a treaty, and that unless its provisions have become incorporated within the municipal law of Uganda, those provisions do not confer rights or impose duties which are justiciable and therefore enforceable by the courts. As has been seen, there was provision in the earlier Constitution for giving the Agreement, or any part of it, the force of law, but no steps were taken to do so. Faced with this position, Mr. Kazzora, for the defendant, argued that the mere fact of the Agreement having been published in the Legal Supplement to the Uganda *Gazette* gave it the force of law without the necessity of any other formality. We are unable to accept this argument. There were no doubt sound reasons for publishing the text of the Agreement in the Legal Supplement of the *Gazette*, not the least of which was the consideration that, had any part of it been given the force of law, it would have been readily available for reference in the bound volumes of statutory law published in each year. It is within our knowledge that Statutes which are expressed to be brought into operation after their enactment upon the happening of a certain event are published in the Legal Supplement after being enacted and not when they are brought or otherwise come into operation. The mere fact of publication in a Legal Supplement does not, in our view, give the matter published the force of law.

It is not in dispute that at all material times Her Majesty had full jurisdiction, power and authority over the whole of Uganda, including the Kingdom of Ankole. That jurisdiction, power and authority has been exercised in the past by a number of Orders-in-Council, of which the last is the Independence Order, and it is well settled law that the jurisdiction so to do is not necessarily to be exercised in accordance with any existing treaty or agreement.

As was said by Denning, L.J., in *Nyali Limited v. Attorney-General* (2), [1956] 1 Q.B. 1 at p. 15:

“Although the jurisdiction of the Crown in the Protectorate is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan. The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus, if an Order-in-Council is made affecting the protectorate, the courts will accept its validity without question: see *Sobhuza II v. Miller and Others* [1926] A.C. 518 at p. 528. It follows, therefore, that in the present case we must look, not at the agreement with the Sultan, but at the Orders-in-Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown’s jurisdiction.”

In the same case, Parker, L.J., said as follows:

“... it is, I think, clear that these courts will not consider the limits of the jurisdiction granted by treaty or otherwise to Her Majesty. Such limits may be extended by sufferance and usage and the courts will and must assume that the legislative or other acts in question are within the jurisdiction granted. All that they can do is to look at the instrument manifesting the exercise of the jurisdiction to see whether it has been lawfully exercised according to the law in force. (Cf. *Sobhuza II v. Miller*, [1926] A.C. 518.)”

We were unable to understand Mr. Kazzora’s submission concerning the interpretation of the Constitution of Uganda and of the Agreement which, if we understood him correctly, was that in considering the effect of an instrument, such as the Agreement, in relation to the extent of Her Majesty’s jurisdiction and powers over a Protectorate, we are not entitled to be guided by judicial precedent, such as has been established in the cases of *Sobhuza II v. Miller* (3), [1926] A.C. 518; *Nyali Ltd. v. Attorney-General* (2) and *Daudi Ndibarema v. Enganzi* (1).

It appeared to us that he argued that as the Constitution of Uganda is now the supreme law of Uganda, we are unable to go behind it by considering earlier views which have been expressed by the Privy Council, by the East African Court of Appeal and by other courts in relation to the exercise of Her Majesty’s powers whether under the prerogative or under the Foreign Jurisdiction Act, 1890.

We confess that we are unable to understand this argument. The Constitution of Uganda is itself a Schedule to an Order-in-Council expressed to have been made by virtue of powers conferred by the Foreign Jurisdiction Act, 1890, and is therefore part of that Order. Although, as is abundantly clear, previous Orders-

in-Council relating to the Uganda Protectorate are expressed to have been revoked, and the constitutional position of Uganda is now that of independence within the Commonwealth, we are nevertheless, in our opinion, entitled to rely upon previous judicial decisions to guide us in our findings in relation to a position which has arisen in which it is suggested that the exercise of Her Majesty's jurisdiction may have been in conflict with her treaty obligations.

For these reasons, therefore, we reject this submission.

It follows then, in our opinion, that all we are entitled to consider in relation to the appointment of the Electoral Boundary Commissioner is what is contained in the municipal law relating to that appointment. The only provision of the municipal law to which our attention has been drawn is that contained in Schedule 2 to the Constitution of Uganda which is set out above.

It is clear that the method of appointment thereby prescribed differs materially from that provided in the Ankole Constitution, and that any existing appointment, even if valid, does not have continued validity by virtue of the Independence Order. It is therefore clear, in our view, that the appointment of the defendant as Electoral Boundary Commissioner of the Kingdom of Ankole is not in accordance with the provisions of the Constitution.

Accordingly, there will be declarations and an injunction in the terms prayed in the plaint.

*Declarations and injunction granted as prayed in plaint.*

For the plaintiff:

*Godfrey Binaisa, QC and SWW Wambuzi (Attorney-General and Crown Counsel, Uganda)*  
*The Attorney-General, Uganda*

For the defendant:

*JW Kazzora*  
*JW Kazzora, Kampala*

## **Municipality of Mombasa v Nyali Limited** [1963] 1 EA 330 (CAN)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Nairobi                                  |
| <b>Date of judgment:</b> | 21 December 1962  |
| <b>Case Number:</b>      | 91/1962   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould JA and Mayers Ag JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | H.M. Supreme Court of Kenya – Edmonds, J                    |

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[1] *Rates – Valuation – Land subdivided into plots – Plots unleased or unsold – Survey made – Beacons*

*placed – Roads made – Whether this constitutes “improvements” within Local Government (Rating) Ordinance (Cap. 137), s. 5, s. 6, s. 26 (K.).*

*[2] Rates – Valuation – Land subdivided into plots – Some plots unleased or unsold – Plots valued individually – Valuation founded on prices paid for sold plots – Whether such valuation fair – Whether land should be valued as one unit or as separate plots – Local Government (Rating) Ordinance (Cap. 137), s. 5, s. 6, s. 26 (K.) – Local Government (Valuation and Rating) Ordinance, 1956 (K.) – Local Government (Town) Ordinance, 1947 (No. 26 of 1947) (Fiji) – Registration of Titles Ordinance (Cap. 168) (K.) – Crown Lands Ordinance (Cap. 155) (K.) – Land Titles Ordinance (Cap. 159) (K.).*

### **Editor’s Summary**

The respondent was the owner of 600 acres within the municipal boundaries of Mombasa of which more than half was leased under a sub divisional scheme involving subdivision into residential plots. The remaining 222 acres were divided into 107 plots, such plots forming part of the original sub divisional scheme. In 1955, a draft valuation roll prepared by the municipality showed

the unimproved site value of each of the 107 plots separately. In valuing these the municipal valuer was influenced by the price at which similar plots had already been sold. Following an objection in writing by the respondent, there was a hearing before the valuation court in March, 1957, at which certain questions of law arose as a result of which a case was stated for the opinion of the Supreme Court (reported at [1959] E.A. 581 (K.)). The court held that, although the plots could be treated as separate hereditaments for rating purposes, in assigning to each plot the value he had, the municipal valuer had overlooked the fundamental principles of valuation set out under s. 6 of the Local Government (Government) Ordinance and that when making his valuation he should have taken into account that, if all the unsold plots were put on the market at the same time, the prices realised would be much less. In August, 1960, the hearing of the respondent's objection was resumed by the valuation court and on October 5, 1960, the respondent's objection was dismissed. During the resumed hearing before the valuation court, the municipal valuer stated that he considered the opinion of the Supreme Court on the case stated, as to the method and factors which should guide the valuer, was wrong and as it was obiter he was not bound to follow it and he adhered to his original valuation which the valuation court accepted. The respondent then appealed to the Supreme Court against the decision of the valuation court. The two principal issues were what was the appropriate method of valuing the premises, that is to say, whether they should be valued as an entity or whether each plot should be valued separately and, if the latter, whether the valuation should have taken into account that if all unsold plots were put on the market at the same time the prices realised would be much less than the prices at which other plots had been sold or leased. This appeal was heard by the same judge who had given the court's opinion on the case stated and, after recording that it appeared to be open to him to reconsider his opinion expressed on the case stated, he held that his decision that the plots should be treated as separate hereditaments for rating purposes was wrong, but that when valuing the land it should be treated as one unit, at its best use, and that value must be related to the enhanced value consequent upon the sub divisional scheme but, since it would take some years before the full benefit of the scheme would be realised, allowance should be made by way of deferment. From this decision the municipality appealed and, whilst raising on appeal the same issues as before, submitted for the first time that, by reason of the opinion of the Supreme Court on the case stated, there was a finding that the proper basis of valuation was valuation of separate rateable units, as to which the best evidence was the sale price obtained for other units of the same subdivision. It was also submitted that whether it was right or wrong to value each plot separately, this issue was res judicata by virtue of the case stated.

**Held –**

- (i) the survey and making of roads effected "improvements" within the definition in the Ordinance and must be regarded, for the purposes of valuation, as if they had not been made.
- (ii) whether premises form one hereditament for rating purposes is a question of fact and the court could not interfere with the judge's finding on this issue unless he had erred in principle, which the court could not say he had.
- (iii) the conduct of the case in the Supreme Court could be looked at as a waiver by the appellant or as creating a quasi estoppel, but in any event the new ground of res judicata sought to be argued was inconsistent with the case presented in the Supreme Court, and it would not do full justice between the parties to permit it to be argued on appeal.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Maori Trustee v. Ministry of Works*, [1958] 3 All E.R. 336.
- (2) *Gollan v. Randwick Municipal Council*, [1961] A.C. 82; [1960] 3 All E.R. 449.
- (3) *Tetzner v. Colonial Sugar Refining Co. Ltd.*, [1958] A.C. 50.
- (4) *Toohey's Ltd. v. Valuer-General*, [1925] A.C. 439.
- (5) *Gilbert (Valuation Officer) v. S. Hickinbottom & Sons Ltd.*, [1956] 2 Q.B. 40; [1956] 2 All E.R. 101.
- (6) *North Eastern Railway Co. v. Guardians of York Union*, [1900] 1 Q.B. 733.
- (7) *Ex parte Reddish: In re Wallon* (1877), 5 Ch. D. 882.
- (8) *North Staffordshire Railway Co. v. Edge*, [1920] A.C. 254.
- (9) *Tanganyika Farmers' Association Ltd. v. Unyamwezi Development Corporation Ltd.*, [1960] E.A. 620 (C.A.).

December 21. The following judgments were read:

**Judgement**

**Sir Trevor Gould JA:** This is an appeal from a judgment and decree of the Supreme Court of Kenya at Mombasa upon appeal to that court from the decision of a valuation court appointed under the provisions of the Local Government (Valuation and Rating) Ordinance, 1956. There were two appeals but they were consolidated in the Supreme Court. Nyali Limited, the then appellant company, had objected to entries in the valuation roll respecting certain land owned by it, but the valuation court refused to allow the objections and upheld the valuations as shown in the roll. The Supreme Court allowed the appeal from the valuation court's decision and substituted a lower valuation. The respondent, the Municipality of Mombasa, has brought the present appeal, and it is not in dispute that it is subject to the provisions of s. 72 and s. 73 of the Civil Procedure Ordinance (Cap. 5 of the Laws of Kenya, 1948) relating to second appeals, which, for the purposes of the present case, restrict the grounds of appeal to questions of law.

The case has had rather a lengthy history and I cannot do better than reproduce that part of the judgment of the learned judge in the Supreme Court in which it is set out. He said:

"Nyali Limited is the owner in fee simple of 3,000 acres known under the registration No. 67/R, s. I, mainland north. The land was previously used for agricultural purposes. 600 acres of the area fall within the Mombasa municipal boundary; of those 600, approximately 300 have been leased under a sub-divisional scheme involving subdivision of the land into residential plots, and of the balance of 300 acres, 148 have been subdivided into some 100 plots, such subdivisions with minor variations, forming part of the original subdivisional scheme. The balance of 152 acres does not fall within the scheme. It is the unleased plots of the sub-divisional scheme which are the subject of the entries in the valuation roll and of the objection by the company."

I pause to say that an immaterial error appears to have occurred in these figures. The area with which the appeal is concerned is now agreed by counsel to be approximately 222 acres divided into 107 plots and not 148 acres divided into 100 plots. The error appears to have originated in the facts agreed in a case stated hereinafter referred to, but nothing turns on this, and the judgment continues:

“In or about November, 1955, the Municipal Board of Mombasa caused a draft valuation roll to be prepared comprising, *inter alia*, the



unalienated plots of the subdivisional scheme which purported to show the unimproved site valuation of each of the plots computed as on the first day of November, 1955, in accordance with the provisions of the Local Government (Rating) Ordinance, Cap. 137.”

It is convenient to say, in parenthesis, that it has been common ground throughout the hearing of the objections and appeals that the Ordinance referred to, though since repealed, governs the question of valuation for the purposes of the case. To continue:

“The appellant submitted an objection in writing to the amount of the valuation which was heard by the valuation court in March, 1957. At the hearing certain questions of law arose and a case was stated for a decision on these questions by the Supreme Court. The questions of law were as follows:

- ‘1. Whether the valuation of the municipal valuer was correct (in valuing each sub-plot as a separate entity); or
- ‘2. Whether the method suggested by the objector is correct, that the basis of valuation should be the price that would be realised by the objector on a sale of all the land retained by it with its present potentials and with the value of the survey scheme included; or
- ‘3. If neither allegation is correct, how the land should in law be rated.’

“On June 16, 1959, judgment was delivered by this court on the case stated (*Nyali Ltd. v. The Municipal Board of Mombasa* (1959), E.A. 581) and it was ruled that the subdivided plots in the company’s scheme could be treated as separate hereditaments for rating purposes. The judgment of the court, however, went on to express the opinion, which I think was clearly obiter, that, in assigning to each of the plots a valuation equivalent to prices at which similar plots under the subdivisional scheme had been sold, the municipal valuer overlooked the fundamental principles of valuation expressed in s. 6 of the Local Government (Rating) Ordinance and that, when making his valuation, he should have taken into account that if all the unsold plots were put on the market at the same time, the prices realised would be much less. In August, 1960, the hearing of the appellant’s objection by the valuation court was resumed and on October 5, 1960, the court dismissed the objection . . .”

That completes the history of the matter. The learned judge went on to say that despite the opinion expressed by the Supreme Court on the case stated as to the method and factors which should guide the valuer, the latter considered that the opinion was wrong and that as it was expressed obiter he was not bound to follow it and adhered to his existing valuation, which was accepted by the valuation court. The reference there is not the valuation of all the plots as separate hereditaments, which the learned judge had held to be correct, but to the opinion that the prices of the plots would have been less if they had all been put on the market at the same time. It is necessary to set out the portion of the judgment which then followed:

“In the present appeals, there are two principal issues, namely,

- ‘(1) What is the appropriate method of valuing the premises, that is to say, whether the premises should be valued as one entity, or whether a value should be assigned to each plot.
- ‘(2) If the latter, should the factor have been considered that, if all unsold plots were put on the market at the same time the price realised

would be much less than the prices at which other plots had been leased.’

“Having stated these issues, it becomes immediately apparent that I am being invited to reconsider the opinions which I expressed in my judgment in the case stated, on the one hand, to reverse my decision, and on the other, to correct my opinion, I have no doubt that provided that I am convinced that my earlier opinions were wrong, it is open to me to correct them. I will state at the outset that I am now persuaded that my decision as to the appropriate method of valuation, that is to say, the treating of the plots of the subdivisional scheme as separate hereditaments for rating purposes, was wrong. I am, however, not persuaded that my subsequent opinion as to the need to have regard when valuing each plot to the fact that all the other unalienated plots would be on the market at one and the same time, was wrong.”

The learned judge then went on to consider in detail the authorities and facts which led him to the conclusion, expressed above, that his earlier view that the plots of the subdivisional scheme should be treated as separate hereditaments for rating purposes, was wrong, and he expressed his final conclusion on the first of the two issues above set out, in the following passage:

“Thus it is that the land must be rated according to what it is – that is to say, one unit or hereditament – and all the facts in my view go to support the conclusion that the land is one unit for rating purposes, and should be so valued. But in valuing the land as one unit or entity, the land must be valued at its best use. Accordingly, the value must be related to the enhanced value of the land consequent upon the subdivisional scheme, but subject to the consideration that it will take a number of years to take full benefit from the scheme and to the need, therefore, to make the necessary allowance by way of deferment.”

In case he was held to be wrong on that question the learned judge considered the second issue, i.e.

“should the factor have been considered that if all the unsold plots were put on the market at the same time the prices realised would be much less than the prices at which other plots had been leased”.

I should say here that the practice of the appellant when alienating plots of the subdivisional scheme was to retain the freehold and to grant leases for 9,999 years at a premium and subject to a rental. On this issue the learned judge adhered to his view that –

“... a most relevant factor affecting the sale of any one plot in the subdivisional scheme is that all the other unalienated plots would be on the market on the same day. It is true that the seller would not get the price at which the plots are presently labelled, but in a notional sale of all the plots, the seller in setting a price for each one, would have to realise that a business consideration which a purchaser would take into account and which he himself must take into account would be the reduced value of the plots consequent upon all being notionally sold on one day”.

He considered that to “devise a method of deferment” would be an acceptable method of taking into account the factor mentioned and arriving at the appropriate value of each plot. He concluded that whether the land should be valued as one entity, or plot by plot, the value in each case would be the same and would be affected by the consideration of deferment.

It is now necessary to enlarge upon the facts. Prior to the case referred to in one of the foregoing passage being sent to the Supreme Court, three witnesses were called before the valuation court for the present respondent and one for the appellant. At this stage facts were settled by the valuation court for the purposes of the case. When the hearing was resumed after the Supreme Court had adjudicated upon the case stated, two of the respondent's witnesses were recalled (one by the court) and the respondent called two new witnesses. The appellant recalled its witness. At the hearing of the appeal in the Supreme Court counsel for the respondent applied to call again his three valuers on the ground that, having read the transcript of their evidence they thought it might be misleading. The application on this (to my mind very doubtful) ground was not opposed, and the result was that a further twenty-eight pages of evidence in single spaced type was recorded for the respondent and nine for the appellant. In his judgment on appeal to the Supreme Court, the learned judge said that the evidence given before the valuation court and the Supreme Court was "a repetition of the facts given in the case stated", by which I think he meant what might be called the primary facts for the bulk of the evidence given subsequently to the case stated was devoted to methods and principles of valuation. Parts of this evidence were referred to in this court by counsel for the respondent, but for the present I will set out only the facts relied upon for the purposes of the case stated which are not, I think, in dispute. They are set out, somewhat unusually, in the form of submission of fact by each side, found to be correct by the valuation court, with a few qualifications. I take these submissions and qualifications from the judgment on the case stated. Those for the respondent were:

- "(a) The photographs (exhibits 2 (a), (b), (c), and (d) show, as at November, 1955, typical parts of the land rated: in the case of all exhibits the area in the foreground has not been subdivided whereas the area in the background has been subdivided.
  - "(b) There are no physical identifiable boundaries as between one sub-division or plot and another or between that part of the plot 67/R which has been subdivided and that part which has not:
  - "(c) The area held by Nyali Limited under 67/R comprising all the land rated is held by them pursuant to a title a copy of which is exhibit 3: the land retained under the deed by Nyali Limited is 3,000 acres: the area which has been assessed for rating purposes is 300 acres, the balance being outside the Municipality. About 152 acres of the land inside the Municipality has not been sub-divided and this has been rated as one entity:
  - "(d) The boundaries between the subdivisions of the plots are marked by Government survey beacons at the plot corners; these survey beacons or pegs are lumps of concrete: the pegs are flat, some are buried under the ground and some stand one or two inches above the ground.
- "It would require a person with some knowledge of survey, or a person with knowledge of the subdivisional plan itself, to find the position of the pegs, and then, having found a peg to relate it to the relevant plot boundary:
- "(e) If a plot is to be pointed out it would be necessary to have labour clear the boundaries of bush in order to find the survey pegs and then point out the actual boundaries of the plot with reference to hypothetical lines joining the pegs.
  - "(f) The approved survey subdivisional scheme can with the requisite consents be changed and has been changed so long as the amenities of plots already alienated are preserved.

- “(g) Nyali Limited could, subject to the normal municipal by-laws, use the land retained by it for any purpose it thought fit, e.g. a sisal estate, golf course, etc.
- “(h) There is no obligation upon Nyali Limited upon alienation of the balance of the land held by it to sell it in plots as presently surveyed.
- “(i) The survey plan has not been registered against the title.
- “(j) A search of the land registry would not show the so-called plots retained by Nyali Limited.
- “(k) The first time a plot is given a section number at the land office is when it is allocated.
- “(l) It will take some considerable time for Nyali Limited to sell all the plots retained by it.
- “(m) The rating authority has rated each subdivision or plot as a separate rateable entity and on the basis of the estimated value which such plot would realise upon a sale.
- “(n) If all the land presently rated by Nyali Limited and assessed for rates was sold together as one entity with the right of a purchaser to use the present subdivisional scheme the amount realised upon such a sale would be less than the aggregate of the rateable values of the so-called plots as assessed. Such difference would be greater than the expense occasioned in effecting the subdivisional scheme and the value to a purchaser of the time saved in not having to implement his own subdivisional scheme.”

The valuation court qualified paragraphs. (b) and (h) as follows:

“Paragraph (b). There are no physical identifiable boundaries other than beacons which may sometimes be difficult to find or locate without the assistance of a surveyor.

“Paragraph (h). It is a fact that there is no obligation upon Nyali Limited to sell the land in plots as presently surveyed but if the company wish to sell they would be able to sell only as subdivided plots unless they submitted a consolidation and subdivision scheme and have it approved by the municipality.”

The appellant's submissions, which were accepted without qualification, were:

- “(1) The practice in preparing the valuation roll has been to consider as a separate hereditament for the purposes of the compilation of unimproved site values any plot of land which after being beaconed and surveyed has been given an individual number by the survey department.
- “(2) That at the time of valuation the individual sub-plots the subject of the objections being part of plot 67/R, had been subdivided. There were other parts of plot 67/R which had been subdivided and leased (shown elsewhere in full) and a remainder of plot 67/R within the Municipality which had not been subdivided.
- “(3) The subdivided plots had been beaconed and surveyed.
- “(4) The deed plans in respect of the individual sub-plots had been issued by the director of surveys and were in the hands of Nyali Limited at the time of valuation. Each deed plan shows on it the anticipated new plot number of the subdivided portion of land.
- “(5) The sub-plots were at the time of valuation on offer for sale separately as building plots.
- “(6) Nyali Limited could sell any individual plot immediately which sale, by reason of the deed plan would, if for a freehold title, be accepted

at the land office for registration as a separate title. If a lease for more than a year were granted it would together with the deed plan be accepted for registration against the title to the freehold.

- “(7) At the time of valuation some of the individual plots to which objection has been made by Nyali Limited and which were shown in the roll as belonging to Nyali Limited had in fact alienated and others were leased between the time of valuation and the date of the laying of the roll before the local authority.
- “(8) There were at the time of valuation, generally speaking, no physical identifiable boundaries other than indicated by beacons between the land retained by Nyali Limited and the alienated subdivisinal plots or between plot 67/R and the adjoining plots. In effect therefore the subplots of Nyali Estate are no more difficult to identify on the ground than are the adjoining and neighbouring plots in separate ownership.”

The picture there presented is one of an existing and complete subdivision, the freehold of which was and remained vested in the respondent, but from which plots had been alienated by way of lease in the past and were still being alienated. There was no impediment to the registration of these leases in the office of the Registrar of Titles, for the whole had been surveyed, the survey plan of the subdivisinal scheme approved, and the deed plans, which enabled registration of leases or transfers, had been issued by the director of surveys in respect of each plot, and were in the hands of the respondent. The plan in evidence shows that the area has been roaded and it is common ground that the roads are formed. The plots have concrete Government survey beacons at the corners but some are buried and might be difficult to locate.

The memorandum of appeal to this court (as amended) is long and to some extent argumentative and it will suffice to set out the summary of his argument given by counsel for the appellant at the close of his submissions. My note indicates that his main submissions were:

1. The court is here concerned with separate rateable units.
2. Even if that were not the case the valuation must be made on that basis.
3. The best evidence of the value of the units is the sale price obtained for other units of the same subdivision.
4. The prices so obtained already reflect the presence of the unsold plots.
5. The rate at which the plots are continuing to sell is a factor common to both residual and alienated plots. To consolidate the unsold plots into one area would be to alter the market factors – the prices for the unsold plots would not take into account that circumstance. Therefore there is no room for devaluation.
6. There is no room for deferment, which is contrary to s. 6 of the Local Government (Valuation and Rating) Ordinance, 1956, which indicates the value as the capital sum which the land might be expected to realise if offered for sale at the time of valuation.
7. Section 6 also requires due regard to be had to other properties of a similar character and value; that imports uniformity of valuation and to discriminate between sold and unsold plots would result in an inequitable distribution of the burden.
8. The issue whether the appropriate basis was that the plots constituted separate rateable units was res judicata by virtue of the judgment on the case stated.

The broad heads of the argument of counsel for the respondent were:

1. That the unsold plots should be valued as one unit.
  - (a) Because the rateable value is that of the unimproved freehold and the survey upon which the claim to subdivision was based was an improvement which must be disregarded.
  - (b) Because the effect of the Local Government (Rating) Ordinance is that *prima facie* the rateable unit is the land of the owner of a freehold as shown in his title. With certain necessary exceptions there is no justification for departing from this approach.
2. The principle of deferment applies whether the land is to be valued as one unit or in separate plots, as s. 6 of the Local Government (Rating) Ordinance requires the valuer to have regard to all surrounding plots for sale.
3. The principle of estoppel per rem judicatem does not apply. In any event the matter was re-opened by consent; there was waiver; the point was taken too late and was inconsistent with the conduct of the case in the courts below.

It will be convenient before I proceed to the consideration of the arguments, to set out the relevant portion of s. 6 (1) of the Local Government (Rating) Ordinance, and the definition of “unimproved value” and “improvements” from s. 2, omitting as irrelevant the proviso to the latter:

“6.(1) The amount or sum at which the valuer shall value, for the purposes of the valuation roll, any rateable property shall be the capital sum which the same might be expected to realise if offered at the time of valuation for sale on such reasonable terms and conditions as a bona fide seller would require, due regard being had not only to such particular rateable property but to other properties of similar class, character, value, position or other comparative factors:

“ ‘unimproved value’ in relation to any land means the sum which the freehold in possession therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose and if the improvements, if any, thereon or appertaining thereto had not been made. The unimproved value of land shall include any value due to any licence, privilege or concession attached to the site for the time being.

“ ‘improvements’ in relation to land means all work actually done or material used on, in or under land by the expenditure of capital, or labour by any owner or occupier of such land, nevertheless in so far only as the effect of such work or material used is to increase the value of the land, and the benefit thereof is unexhausted at the time of valuation; but shall not include machinery, whether fixed to the soil or not; nor shall it include work done or material used on or for the benefit of such land by the Crown or by any statutory public body unless such work has been paid for by the contribution of the owner or occupier of such land for that purpose:”

I will deal first with the case of *Maori Trustee v. Ministry of Works* (1), [1958] 3 All E.R. 336, by which the learned judge was guided in the Supreme Court on the case stated; in the judgment now under appeal he decided that the acceptance of such guidance had been, in the circumstances, erroneous. The case, which was decided by the Privy Council on appeal from the Court of

Appeal of New Zealand, related to valuation upon compulsory acquisition of land by the Government. The factor in issue which is relevant in the present case was the effect to be given to what is described in the headnote as

“a paper plan of the proposed subdivision of the 242 acres, which were not then subdivided in fact”.

Necessary consents to the subdivision had not been obtained and there were no roads, drainage or other facilities. The relevant test as laid down by their lordships in the Privy Council at p. 343 of the report, is as follows:

“(iii) The court must contemplate the sale of the land as a whole unless it appears that the necessary legal consents to a subdivisional plan had been given and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided may be separately valued, for the purpose of arriving at the total amount of compensation’.”

Plainly the facts in the present case are entirely different from those in the *Maori Trustee* case (1), and to my mind it is beyond dispute that the present subdivision is complete and operative and would justify separate valuation of the plots in a case of compulsory acquisition in order to ascertain the total price. The learned judge so held on the case stated and did not resile from that opinion in his later judgment in relation to compulsory acquisition, but he then concluded that, while certain basic principles of valuation may be common to valuations for rating purposes and for the purposes of compulsory acquisition, the principles do not apply in all circumstances. He then pointed out that:

“For rating purposes, the valuation must be related to the land; in compulsory acquisition, the value must be related to the amount of compensation the owner should receive for his loss. In compulsory acquisition, the owner’s interest is valued for what it is, that is to say, leasehold land is valued as leasehold land, and due account is taken of the improvements to the land; whereas for the purpose of rating, the land is treated notionally as freehold and improvements have to be disregarded.”

He then said:

“... I do not overlook the statement by Lord Radcliffe in *Gollan v. Randwick Municipal Council*, [1961] A.C. 82; [1960] 3 All E.R. 449 where at p. 96 of the former report he states:

‘It will clear the ground if their lordships say at this point that in their view the principles which determine questions of compensation for property resumed or expropriated are not of assistance on questions of rating assessment.’

“But at p. 100 this statement is modified when he says:

‘A basis of valuation that may seem reasonable and appropriate for one of these purposes is not necessarily suitable for another.’

“I think, therefore, that it was intended by Lord Radcliffe to indicate that there may be principles of valuation common both to compulsory acquisition and rating. One of these is the market value of the land, but to arrive at the market value of land on compulsory acquisition may involve different considerations from those affecting the value for rating purposes.”



With respect I agree with what is stated in these passage but I think the whole question is reducible in each to the consideration of the language used in the particular legislation governing the question before the court. If the language governing valuation in a rating statute and in a compulsory acquisition statute is the same, I do not think that there is so great a divergence between the two concepts of rating and acquisition that a different meaning should for that reason alone be ascribed to the same language – I am confident that no such idea was implied in the passage from *Gollan v. Randwick Municipal Council* (2), [1961] A.C. 82. I would not therefore be inclined to exclude all consideration of what was decided in the *Maori Trustee* case (1), unless that approach is inconsistent with the legislation applicable in Kenya. The substantial distinction is that what has to be valued for rating purposes in the present case is the unimproved capital value of the land, as defined.

That raises the question whether the survey of the subdivision, the placing of beacons, and the construction of roads is an improvement within the definition, which has already been set out. If it is and if it is improvement falling within the phrase “thereon or appertaining thereto” it must be treated as if it had not been made. The learned judge in the judgment under appeal considered that it was an improvement, in that capital had been expended, work had been done, with the result that the value of the land had been enhanced. In this court counsel for the appellant argued to the contrary, basing his submission upon the decision of the Privy Council in *Tetzner v. Colonial Sugar Refining Co. Ltd.* (3), [1958] A.C. 50. In that case the boundaries of a town had been extended so as to include 650 acres of land belonging to the respondent company, upon which was a sugar mill to the existence of which the town owed a substantial measure of its prosperity. The basis of rating was the unimproved value of the land, and the dispute was whether it should be valued at a figure which would reflect the assumed lower value of land if the district had never had the benefit of the industry based upon the sugar mill, or at the higher figure which the land would be worth as part of the existing town in its actual prosperous state. It was held that the latter was the appropriate basis. Section 100 of the Local Government (Towns) Ordinance, 1947 (No. 26 of 1947) of Fiji, as amended and as set out in the report at p. 52, is as follows:

“100. The unimproved value of land shall be the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require assuming that the improvements, if any, thereon or appertaining thereto and made or acquired by the owner or his predecessors in title had not been made’.”

Counsel relied upon the following passage from the judgment, at p. 56:

“The section draws a clear distinction between the land and the improvements on or appertaining to the land. And the improvements have to be made or acquired by the owner or his predecessor in title. The improvements pointed to, are, in their lordships’ opinion, clearly physical improvements of one kind or another and not an improvement, or increase, in the value of the bare land. It is these physical improvements and any value directly attributable to and inhering in them that have to be excluded from valuation.”

Counsel submitted that a survey with consequent beacons was not the type of physical feature which could be described as improvements. The roads were not in any plot. The principle of *Tetzner’s* case (3), was, he submitted, that an enhancement of unimproved values due to expenditure by the owner may properly be taken into account in determining values for rating purposes.



Unfortunately for this argument there is at least one basic distinction between *Tetzner's* case (3), and the present one. By courtesy of counsel the court has been able to see the record of proceedings before the Privy Council in the former, and it was twice stated in argument that the Fiji legislation (which is not available here) contained no definition of the word "improvements". In Kenya there is such a definition in the Local Government (Rating) Ordinance, and I have set it out earlier in this judgment. I do not think that even if there had been such a definition in the Fijian legislation, *Tetzner's* case (3), would have been decided differently, for what their lordships were considering there, in apposition to physical improvements, was not an improvement in any accepted sense of that word but a general increase in land values due to the activities of the respondent company. The following sentence from the judgment (at p. 58) expresses the approach:

"Nor can they extract from the judgment any principle that would prevent a valuer in assessing the unimproved value of land from resorting for purposes of comparison to the values of surrounding land at the date of valuation even though these values may have been largely built up by the initiative of the owner of the subject land in developing the neighbourhood."

Their lordships had earlier said that if the sugar mill had happened to be outside the town boundary its influence could not have been ignored.

In the present case there can only be one approach. If the survey, with the attendant beacons and roads, is something which falls within the definition of "improvements" and if, with relation to the land, it is "thereon or appertaining thereto" then for the purpose of ascertaining the unimproved value it must be regarded as if it had not been made. In the case of *Toohey's Ltd. v. Valuer-General* (4), [1925] A.C. 439, dealing with similar legislation, their lordships in the Privy Council said, at p. 443:

"They [i.e. the improvements] are to be taken, not only as non-existent, but as if they never had existed."

In *Tetzner's* case (3), their lordships rather deprecated the last phrase, "... as if they never had existed" as having no special significance, but in the latest case of *Gollan v. Randwick Municipal Council* (2), at p. 94 they quoted *Toohey's* case (4), as deciding that

"the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all".

I cannot escape the conclusion that what was done does fall within the definition of improvements. There was work done on the land in the survey, the placing of beacons, and in the formation of roads. The whole appertains to the land. The beacons may be of little intrinsic value in themselves, but they, with the roads, ensure that the benefit of the work was not exhausted at the time of valuation. The roading itself would increase the value of the land and the accompanying survey and marking into plots would increase it still further – in fact this is the very basis of the valuation made for the appellant. Counsel for the appellant has said that the roads were not in any plot, but that is beside the point: they are part of the original block of land upon which the subdivision was carried out. They are private roads. In *Tetzner's* case (3), the roads were disregarded by the magistrate as an improvement (and the Privy Council saw no reason, on the evidence, to interfere) but they were described as Government roads and it was accepted that for many years past they had been maintained by the public authority. That does not apply here. I should mention that the form of lease used by the respondent contains provision that the lessee will reimburse or pay the respondent the cost of making

and maintaining roads, limited to the cost of such portion of the roads as is actually contiguous to the plot leased. This, in my opinion, does not affect the question whether the original expenditure amounted to or effected an improvement – it is merely a method of obtaining reimbursement alternative to that of making an addition to the premium payable on alienation. For these reasons in my judgment the roads and survey effected improvements and must be regarded, for the purposes of valuation, as if they had not been made.

In the judgment under appeal the learned judge next dealt with the question of the rateable unit or hereditament. This is a concept which is not defined either in the English or Kenya legislation. Counsel for the respondent sought to draw from the provisions of s. 26 of the Local Government (Rating) Ordinance, read with s. 5 and in the general context of the Ordinance, an indication that the rateable unit (at least *prima facie*) was the land of a person as shown in the title or title deeds registered under the Registration of Title Ordinance (Cap. 168), the Crown Lands Ordinance (Cap. 155) or the Land Title Ordinance (Cap. 159). Section 26 provides in effect that the “rateable owner” and the person liable for payment of the rate, is the person who, when a rate becomes due is registered (under one of the three Ordinances mentioned) as the owner of the freehold, or as lessee for a term of not less than ten years, of rateable property. While I think that the registered title may provide a convenient starting point as a guide to the rateable unit I see nothing in the section to indicate that, as a matter of law, it is necessarily a firm or rigid guide. Counsel had to concede that in the present case a substantial area outside the subdivision, but inside the municipal area, owned by the respondent and included in the same freehold title as the subdivision, had been separately valued and assessed, presumably on the basis of different user. This valuation was very favourable to the respondent and it has not been attacked, but counsel for the respondent suggested that the valuer might have been in error in so dividing the land; I think that all that can be drawn from this is an indication that it has not been the practice to regard the registered title as concluding the matter. In the Supreme Court the learned judge was guided by tests laid down in *Gilbert (Valuation Officer) v. S. Hickinbottom & Sons Ltd.* (5), [1956] 2 Q.B. 40 in which Denning, L.J., (at p. 48) said that there was no statutory definition but that the practice prevailing for many years warranted certain general rules. Subject to any evidence of practice which might be given in Kenya, I do not think that the fact that the English rating system is generally based on annual value and not unimproved value necessarily renders the tests laid down wholly inapplicable in Kenya. There would be a need for caution, but the tests appear basically to embody a common-sense approach.

The learned judge relied upon the rule laid down by Denning, L.J., that generally when two properties are within the same curtilage or contiguous to one another and are in the same occupation, they are to be treated as a single hereditament. He placed weight also upon the words of Parker, L.J., at p. 54 indicating the importance of whether the premises formed a single geographical unit and could be ringed round on a map. The judge said, with regard to the subdivision, that it only made it practicable for the land to be divided, that it was not divided in law until legal steps of registration were taken, and that while it was undivided it was one hereditament. It was stated by Morris, L.J., in *Gilbert v. S. Hickinbottom & Sons Ltd.* (5), at p. 52, that whether premises form one hereditament for rating purposes is a question of fact; it was also so held in *North Eastern Railway Co. v. Guardians of York Union* (6), [1900] 1 Q.B. 733. On this second appeal this court is restricted to questions of law and unless the judge has erred in principle in arriving at his decision on this question it would not be for this court to interfere. I cannot say that the judge’s view of the application to the facts of the case of the tests

mentioned is unreasonable, and if there is room for any error in principle in the approach adopted (and I do not say there is) it lies in the question of the effect of the subdivision, which the learned judge regarded as existing for the purpose of his consideration of this aspect of the case. This is a matter which cannot assist the appellant in any way, in view of the finding of the learned judge, with which I agree, that the subdivision amounted to an improvement. The valuer is enjoined by the Local Government (Rating) Ordinance to ignore it when arriving at the valuation of the unimproved land. When he sets out to value the land he must visualise it as unsubdivided, and that leaves him no basis for saying that he will take separately as rateable units all the plots of the subdivision. Whether, in the course of further alienation the remaining land may become so divided and separated as to justify the valuer in treating them as separate rating units on the principle laid down in *Gilbert v. S. Hickinbottom & Sons Ltd.* (5), does not now arise. Nor is it necessary to decide whether, if the respondent took out separate titles for the unsold plots, in its own name, that would justify a different approach, as the learned judge accepted would be the case.

A similar answer may be given to a further submission by counsel for the appellant based on *Tetzner's* case (3). The valuer in that case notionally divided the unimproved land into a number of separate lots to which he applied different value. To give only one example from his evidence, he considered certain elevated lands with a good view and easy contours as being suitable for dwellings. The valuer totalled these various values to arrive at the value to be placed upon the whole. No objection was taken to this course in the Privy Council. Counsel for the appellant has submitted that, even if the subdivision in the present case is to be ignored, the same principle would entitle the valuer to make a notional subdivision and arrive at the same result. I think this is going too far. The valuer could legitimately put a higher value, for example, on the parts of the land which are nearer to the sea than others, or take note of other geographical features, in arriving at the value of the whole. He would also be entitled to take into account the suitability of the land for subdivision, but, being enjoined to treat the actual subdivision and roads as if they had not been made, he could not go further. The practice of the appellant's valuer (referred to in the facts above stated) to treat as separate rateable units all subdivisional plots beacons and numbered, cannot prevail against the injunction implicit in the definitions of "improvements" and "unimproved property".

For these reasons I consider that the learned judge was correct when he found that no assistance was to be drawn in the present case from what was decided in the *Maori Trustee* case (1), and that the land must be valued as one unit. On this basis the three valuers called for the respondent were agreed that the principle of deferment would apply, and they considered that, having regard to the slow rate of sales over the past years, there would be an average delay of seven years in selling the remaining plots. This would be reflected in the price obtainable for the land as a whole. The valuer for the appellant conceded in cross-examination that if the land were not subdivided he would have allowed deferment. Whether the amount of the reduction allowed by the valuers under this head was appropriate has not been put in issue on this appeal; it would appear to be a question of fact and not challengeable except on the score of an error in principle. It is not, therefore, for this court to say that the learned judge was not justified in accepting the valuation which he did. On my findings it is not necessary for me to deal with the further question, whether even if it were permissible for the plots to be valued separately, the principle of deferment would still apply, on the basis of the valuers' estimates that there would be delay in sale averaging seven years overall.

I now turn to the submission for the appellant that by reason of the judgment on the case stated, there was a finding that the proper basis of valuation of the

land was in separate plots, and that the question was res judicata and not open to challenge. Whatever the merits of that plea might have been if raised at the proper time, I am satisfied that the appellant ought not to be permitted to rely upon it on this appeal. It was not included in the original memorandum of appeal but was added by amendment at a late stage after there had been a change of counsel. When the appeal came on in the Supreme Court no question of res judicata was raised. Instead, a mass of further evidence was taken and counsel on each side addressed upon the question whether valuation in separate lots was or was not the correct basis. The learned judge considered, and with justification, that he was being invited to reconsider the whole matter. If he wished to rely upon it, it was incumbent, in my opinion, upon the then counsel for the (present) appellant to take the point at the commencement of the proceedings in the Supreme Court, and to object to any evidence having a bearing on the question and to any argument relating thereto. If he had done that, it is possible that counsel for the respondent might have obtained leave out of time to appeal against the judgment on the case stated, and the final result would have been that the same questions would have been agitated in this court as have in fact been argued. The conduct of the case in the Supreme Court might be looked at as a waiver by the appellant or as creating a quasi estoppel, but in any event the new ground sought to be argued is inconsistent with the case presented in the Supreme Court and it would not I think be doing full justice between the parties to permit it to be argued here: see *Ex parte Reddish: In re Wallon* (7) (1877), 5 Ch. D. 882 and *North Staffordshire Railway Co. v. Edge* (8), [1920] A.C. 254, which were relied on by this court in *Tanganyika Farmers' Association Ltd. v. Unyamwezi Development Corporation Ltd.* (9), [1960] E.A. 620 (C.A.) at p. 627.

For the reasons I have endeavoured to express I would dismiss the appeal with costs and certify for two counsel.

**Sir Ronald Sinclair P:** I agree. The appeal will be dismissed with costs and there will be a certificate for two counsel.

**Mayers Ag JA:** I agree and have nothing to add.

*Appeal dismissed.*

For the appellant:

*Bryan O'Donovan, QC and OS Obhrai*  
*O'Brien Kelly & Hassan, Mombasa*

For the respondent:

*Gerald Harris and JN Desai*  
*Hamilton Harrison & Mathews, Nairobi*

## **Guaranty Discount Co Ltd v Credit Finance Corporation Ltd and another** [1963] 1 EA 345 (CAD)

**Division:** Court of Appeal at Dar-Es-Salaam

**Date of judgment:** 26 April 1963

**Case Number:** 64/1962  
**Before:** Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Tanganyika – Murphy, J

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*[1] Mortgage – Equitable mortgage by deposit of title deeds – Agreement for loan on undertaking by company to give mortgages – Part loan towards redemption of another mortgage – Money advanced – Legal mortgages drawn – Mortgages ineffective owing to absence of charging clause – Further loan made fully to redeem other mortgage – Title deeds delivered to lender on company’s instructions after further payment to extinguish mortgage – Whether equitable mortgage by deposit of title deeds created – Whether appellant a secured creditor by subrogation – Land Ordinance (Cap. 113) (T.) – Land Regulations, 1948, reg. 3 (T.) – Land (Amendment) Regulations, 1958, reg. 2 (T.) – Land (Amendment) Regulations, 1960, reg. 3 (T.) – Registration of Documents Ordinance (Cap. 117), s. 8 and s. 9 (T.) – Companies Ordinance (Cap. 212), s. 79, s. 82 and s. 90 (T.) – Land (Law of Property and Conveyancing) Ordinance (Cap. 114) (T.) – Land Registration Ordinance (Cap. 334), s. 41, s. 64 and s. 91 (T.).*

*[2] Company – Liquidation – Loan made to company towards redemption of mortgage – Undertaking by company to secure loan by mortgage – Further loan to extinguish mortgage – Company’s title deeds handed to lender after repayment of mortgage – Whether equitable mortgage created in favour of lender – Whether lender secured by virtue of subrogation – Companies Ordinance (Cap. 212), s. 79, s. 82 and s. 90 (T.) – Land (Law of Property and Conveyancing) Ordinance (Cap. 114), (T.).*

### **Editor’s Summary**

By an agreement dated July 22, 1959, the appellant agreed to lend the C.S. Company Shs. 1,300,000/- part of which was to be applied in repayment of two loans and the balance towards redemption of a mortgage held by one, Mrs. K., secured upon four properties. The agreement also provided that the C.S. Company should forthwith grant to the appellant first legal mortgages or charges over the four properties. The two loans were duly repaid and the balance, which was insufficient to redeem Mrs. K.’s mortgage, was paid to Mrs. K.’s agents. On February 26, 1960, the C.S. Company executed documents purporting to be mortgages of the four properties which were then sent to the appellant and on September 3, 1960, the appellant advanced to the C.S. Company the balance due to Mrs. K. in exchange for the release of her mortgage and the documents of title to the properties. The releases and the mortgages of the properties to the appellant were duly stamped and, after the consent of the land officer on behalf of the Governor had been received, the mortgages were presented for registration. One mortgage upon unregistered land was accepted for registration but the other affecting registered land was rejected because it did not comply with the Land Registration Ordinance. On September 7, 1960, a notice of deposit pursuant to s. 64 of the Ordinance was registered at the Land Registry on behalf of the appellant and on October 3, 1960, particulars of charge by deposit of title were lodge with the Registrar of Companies under s. 79 and s. 90 of the Companies Ordinance, showing the amount secured as Shs. 1,300,000/-. A certificate of registration was issued which under s. 82 (2) of the Companies Ordinance became “conclusive evidence that the requirements

of this Part of this Ordinance have been complied with". On March 8, 1961, the High Court of Tanganyika made an order for winding-up of the C.S. Company. Subsequently when the Official Receiver and Liquidator of the C.S. Company admitted the appellant as a secured creditor, two other creditors, respondents in this appeal, applied to the High Court to have this decision set aside. The judge held that the agreement of July 22, 1959, created an equitable mortgage on the properties but that this agreement was void for want of registration. On appeal the main issues were whether the appellant was a secured creditor by virtue of any equitable mortgage charge or by subrogation.

**Held** – (per Newbold, J.A., and Sir Ronald Sinclair, P.; Sir Trevor Gould, Ag. V.-P., dissenting):

- (i) where title deeds are handed over by a debtor to a creditor against payment of money a very strong presumption arises that the deposit has been made with a view to the creation of an equitable mortgage over the entire interest of the debtor in the properties concerned and for the entire amount then due by the debtor to the creditor.
- (ii) in the instant case the facts showed that the entire amount was advanced against security of the properties and there was no evidence which rebutted this presumption.
- (iii) the fact that the certificate of registration referred to the deposit of title deeds as being security for the sum of Shs. 1,300,000/- and not for the full amount was immaterial; the only result of this would be that if the properties were worth a sum in excess of Shs. 1,300,000/-, the difference could not be secured as against the liquidator and creditors of the company.
- (iv) the appellant was a secured creditor by virtue of the deposit of the title deeds.

Appeal allowed.

**[Editorial Note – Obiter:** The court also held unanimously that the appellant was entitled to be subrogated to the mortgage of Mrs. K. to the extent to which her advance was paid out of funds provided by the appellant.]

**Cases referred to in judgment:**

- (1) *Rogers v. Challis* (1859), 27 Beav. 175; 54 E.R. 68.
- (2) *In re Jackson & Bassford Ltd.*, [1906] 2 Ch. 467.
- (3) *In re Yolland, Husson & Birkett Ltd.*, [1908] 1 Ch. 152.
- (4) *Esberger & Son Ltd. v. Capital and Counties Bank*, [1913] 2 Ch. 366.
- (5) *In re N. Defries & Co. Ltd.*, [1904] 1 Ch. 37.
- (6) *In re Gregory Love & Co. Ltd.* (1916), 85 L.J. Ch. 281; [1916] 1 Ch. 203.
- (7) *In re Columbian Fireproofing Co. Ltd.*, [1910] 2 Ch. 120.
- (8) *In re Cardiff Workmen's Cottage Co. Ltd.*, [1906] 2 Ch. 627.
- (9) *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434.
- (10) *Hari Sankar Paul v. Kedar Nath Saha*, [1939] 2 All E.R. 737.
- (11) *Obla Sundarachariar v. Narayanna Ayyar* (1931), 58 I.A. 68.

- (12) *Subramonian v. Lutchman* (1922), 50 I.A. 77.
- (13) *Pranjivandas Mehta v. Chan Ma Phee* (1916), 43 I.A. 122.
- (14) *Shaw v. Foster* (1872), L.R. 5 H.L. 321.
- (15) *Chetwynd v. Allen*, [1899] 1 Ch. 353.
- (16) *Whiteley v. Delaney*, [1914] A.C. 132.
- (17) *Goluldoss Gopaldoss v. Rambux Sevchand* (1884), 11 I.A. 126.
- (18) *Butler v. Rice*, [1910] 2 Ch. 277.
- (19) *Ghana Commercial Bank v. Chandiram*, [1960] A.C. 732; [1960] 2 All E.R. 865.
- (20) *National Provincial and Union Bank of England v. Charnley*, [1924] 1 K.B. 431.



April 26. The following judgments were read:

### **Judgment**

**Sir Trevor Gould Ag V-P:** This is an appeal from a decision of the High Court of Tanganyika at Dar-es-Salaam whereby a decision of the Official Receiver and Liquidator of a company called Crete Sisal and Coffee Estates Limited to admit as a secured creditor in that liquidation the appellant, Guaranty Discount Company Limited, in the sum of Shs. 1,300,000/-, was set aside. The learned judge declared the appellant not to be a secured creditor. I will refer in this judgment to the appellant as “Guaranty Discount” and to the company now in liquidation as “Crete Sisal”. The application before the liquidator was opposed by two other creditors, who are also the respondents in this appeal.

There is no dispute as to the major facts. An agreement dated July 22, 1959, was entered into between Crete Sisal and Guaranty Discount whereby the latter agreed to lend and the former to borrow the sum of Shs. 1,300,000/- on July 31, 1959. Crete Sisal agreed to apply that money as follows:

- (1) Shs. 239,755/24 to be paid to Premchand Raichand Ltd. in extinction of a debt due to that company by Crete Sisal.
- (2) Shs. 599,392/09 to be paid to Guaranty Company of East Africa Ltd. in extinction of a debt similarly due by Crete Sisal to that company; and
- (3) The balance “towards redemption” of a first mortgage earlier given by Crete Sisal to Mrs. A. E. Katakis over four pieces of land, three of which were registered in the Land Office as rights of occupancy and the fourth was an offer and acceptance of a right of occupancy as yet unregistered.

The three pieces of land first abovementioned totalled 1,433.37 acres and will be referred to hereafter as the registered land, while the fourth piece, 922 acres, I will call the unregistered land. In the agreement under discussion it was recited that the amount owing under Mrs. Katakis’ mortgage was (as at August 15, 1959) Shs. 466,650/- for principal and Shs. 23,332/50 for interest, a total of Shs. 489,982/50. The amount available after paying off Premchand Raichand Ltd. and Guaranty Company of East Africa Limited falls short of the amount said to be owing to Mrs. Katakis by Shs. 29,129/83, which presumably was to be found by Crete Sisal, for the agreement went on to provide that Crete Sisal should “forthwith grant” to Guaranty Discount “first legal mortgages and or charges” over the registered and unregistered lands to secure Shs. 1,300,000/- and interest.

Guaranty Discount paid the Shs. 1,300,000/- to Messrs. Robson, Harris & Co., advocates, who paid the amounts due to Premchand Raichand Ltd. and Guaranty Company of East Africa Ltd. on July 29, 1959, and the balance (less a deduction for costs) to Mrs. Katakis’ agents on August 17, 1959. The record does not disclose whether the whole of the Shs. 1,300,000/- was paid to the advocates (who acted for Crete Sisal) before July 31, 1959, but it seems probable that it was so.

On February 26, 1960, documents purporting to be mortgages of the registered and unregistered land were executed by Crete Sisal and, on March 21, 1960, they were sent by Mr. Robson to Guaranty Discount. There appears to have been some difference of opinion as to the amount remaining owing to



Mrs. Katakis, but on September 3, 1960, a further Shs. 245,540/10 was paid to her advocates in exchange for releases of her mortgages and the relative certificates and document of title. Guaranty Discount had executed its own mortgages the previous day – September 2. It is common ground that the additional money paid to Mrs. Katakis was provided by Guaranty Discount.

The releases and mortgages were duly stamped and the mortgages received the consent of the land officer on behalf of the Governor (under the Land Regulations, 1948, as amended, made under the Land Ordinance (Cap. 113) of the Revised Laws) on September 8, 1960; but while the mortgage of the unregistered land was on that day registered in the Registry of Documents, registration of the mortgage of the registered land (which is required under the Land Registration Ordinance (Cap. 334)) was refused, as the document did not comply with the requirements of the Ordinance. It would appear that neither of these deplorable examples of draftsmanship contained any provision charging the land intended to be mortgaged.

On September 7, 1960, a notice of deposit was registered in the land registry on behalf of Guaranty Discount. This was done, the court was informed, pursuant to s. 64 of the Land Registration Ordinance, to which I will have occasion to refer later. On October 3, 1960, particulars of charge by deposit of the certificates of title of the registered land and the document of title to the unregistered land were lodged with the Registrar of Companies by Guaranty Discount under s. 79 and s. 90 of the Companies Ordinance (Cap. 212 of the Laws of Tanganyika, 1947) – the amount secured was shown as Shs. 1,300,000/-. A certificate of registration under s. 82 (2) of that Ordinance was given by the Registrar of Companies on October 3, 1960, and under the provisions of that sub-section became

“conclusive evidence that the requirements of this part of this Ordinance as to registration have been complied with”.

On March 8, 1961, a winding-up order in respect of Crete Sisal in Tanganyika was made by the High Court.

It will now be necessary to examine the rights of the parties arising out of the transactions abovementioned but it will be helpful to preface that examination by quoting s. 2 (1) of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114 of the Revised Laws) which reads:

“2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the territory.”

It will be seen that the English authorities are relevant, subject to the consideration that the relevant date is prior to the passing of the Law of Property Act, 1925.

The essential question is whether Guaranty Discount can rely upon the delivery of particulars of charge on October 2, 1960 (and the ensuing certificate by the registrar) as being sufficient compliance with the requirements of s. 79 of the Companies Ordinance. Under that section delivery of particulars must take place within forty-two days after the date of the creation of a charge – Otherwise it is void against the liquidator and creditors. The first argument of

Mr. Nazareth, counsel for Guaranty Discount, was that no charge was created by the agreement of July 22, 1959, because no money was owing by Crete Sisal to Guarantee Discount at that date and none was advanced upon the execution of the document. A contract to lend money is not specifically enforceable (he relied upon *Rogers v. Challis* (1) (1859), 27 Beav. 175; 54 E.R. 68) and therefore, counsel submitted, the document created no charge. That, however, is not a full statement of the position. Whatever may have been the rights of the parties had they fallen out on July 23, 1959, the fact is that the sum of Shs. 1,300,000/- was advanced by Guaranty Discount in terms of its obligations and I know of no authority or any requirement of principle which might indicate that the contract by Crete Sisal to grant legal mortgages did not thereupon become specifically enforceable. So far as ordinary principles of law are concerned I am satisfied that, at least from the time at which the money was advanced, the agreement of July 22, 1959, constituted an equitable security. Mr. Nazareth, however, advanced two further arguments on this aspect of the question, though only one of them, in my opinion, requires serious consideration. The first was that there was a covenant in Mrs. Katakis' mortgages that Crete Sisal would not mortgage or otherwise dispose of the equity of redemption. It was of course intended that these mortgages would be released; but in any event this was a contractual matter and could not defeat an equitable charge if created. The more important matter is that the consent of the Governor had not been obtained to the agreement of July 22, 1959. At that date reg. 3 of the Land Regulations, 1948 (as replaced by reg. 2 of the Land (Amendment) Regulations, 1958) read:

- "3.(1) A disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the Governor.
- "(2) In this regulation 'Right of Occupancy' means a Right of Occupancy granted under s. 6 or s. 12 of the Land Ordinance.
- "(3) In this regulation 'disposition' means a sale, conveyance, mortgage other than an equitable mortgage by way of deposit of title deeds, sub-lease containing an option to purchase, devise by will or codicil, sale or conveyance in execution of any decree or order of a court and includes an agreement to make any of the above forms of disposition, but does not include any decree or order of a court except a final decree for foreclosure of mortgage or a transfer by operation of law on death or bankruptcy."

The registered land comprises three rights of occupancy and the unregistered land, one – unless in the last-mentioned case it could be argued that there was no completed right of occupancy as defined in the regulation. That point was not taken in argument (which was very brief on this aspect of the matter) and I propose to disregard it. It is claimed then that the agreement in question never became operative, that it could not therefore have created a charge, and therefore did not require registration under the Companies Ordinance. If the matter rested there I would say the argument was one of substance. But reg. 3 was again replaced by the Land (Amendment) Regulations, 1960, which were published on April 8, 1960, and then read:

- "3.(1) A disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the Governor.
- "(2) In this regulation 'right of occupancy' means a right of occupancy granted under s. 6 or s. 11 of the Land Ordinance.
- "(3) In this regulation 'disposition' means –
  - (a) a conveyance or assignment other than by way of mortgage, or a gift, settlement, deed of partition, assent, vesting declaration, or a sale in execution of an order of a court;

- (b) a mortgage other than –
  - (i) an equitable mortgage by deposit of title deeds; or
  - (ii) a mortgage which by law is only effectual if registered in the register of documents or the land register;
- (c) a deed or agreement or declaration of trust binding any party thereto to make any such disposition as aforesaid, including a deed or agreement entitling a party thereto to require any such disposition to be made;
- (d) decree of foreclosure of a mortgage.”

The agreement of July 22, 1959 (in so far as it relates to the registered land) was an agreement to execute a mortgage of a type falling within sub-para. 3 (3) (b) (ii) of that regulation; such a mortgage therefore would not be a disposition and under sub-para. 3 (3) (c) agreements are only dispositions if they relate to dispositions. The requirement of the Governor’s consent, in relation to the registered land, appears therefore to have been terminated on April 8, 1960, after which the contract would become operative. With regard to the unregistered land, by s. 9 of the Registration of Documents Ordinance (Cap. 117 – Revised Laws) no document of which registration is compulsory shall be effectual (*inter alia*) to render land liable as security for payment of money unless and until it is registered. By s. 8 compulsory registration is required of a number of dealings in land (except with land subject to the Land Registration Ordinance) which would include a mortgage of the nature contemplated by the agreement of July 22, 1959. The agreement itself did not require registration under the Registration of Documents Ordinance as by s. 8 (2) (b) documents which merely create a right to obtain another document which will create, etc. a right, title or interest in the land, are excepted. The result is therefore the same in the case of the unregistered land. The contemplated mortgage would not be a disposition within reg. 3 of the Land Regulations, 1948 (as amended), and the agreement itself, not being an agreement to make “a disposition” is not itself one. The agreement of July 22, 1959, in my opinion, became fully operative on April 8, 1960, and I can find no assistance for the case put forward on behalf of Guaranty Discount, in the argument relating to the consent of the Governor.

It will be convenient to deal next with the question of the adequacy of the particulars of charge delivered to the Registrar of Companies on October 3, 1960. Whether a charge was created (within the meaning of s. 79 of the Companies Ordinance) on September 2 or 3, 1960, is a separate question, but assuming for the moment that it was and that the new mortgages came into operation at that time, it is clear that the particulars were delivered within the period of forty-two days allowed. What happened was that on September 2, the mortgages, executed earlier by Crete Sisal, were executed by Guaranty Discount. That was necessary at least in the case of the mortgage of registered land, as s. 91 of the Land Registration Ordinance provides that no deed shall be registered unless executed by all persons who are parties thereto. On September 3 the balance of moneys claimed by Mrs. Katakis was paid and the releases of her mortgages with the relative certificates and document of title were handed to Guaranty Discount. The intention of course was to register the releases and the new mortgages and obtain the equivalent of a mortgage of the legal estate in the registered land and of such estate as Crete Sisal were entitled to in respect of the unregistered land. It was found that the new mortgages contained no provision charging any land and registration of the mortgage of registered land was refused. The releases of Mrs. Katakis’ mortgages were not registered (or so the court was informed by counsel). The

new mortgages, having failed in their full intended effect, in my opinion, together with the deposit of the certificates and document of title gave rise to an equitable security. Either the new mortgages or the deposit alone if it could be regarded entirely apart from what had gone before would in the circumstances have had that effect, as the intention of the two new mortgages, read together, is clearly ascertainable, and Guaranty Discount would have had a valid claim for their rectification, and a deposit of deeds by itself with intent to create a security is sufficient.

When particulars of charge were delivered to the Registrar of Companies, the new mortgages were ignored. It was stated that there was “No instrument. Deposit of Title Deeds”. The amount was given as Shs. 1,300,000/-, the date as September 2; the certificates and document of title were identified and the release of Mrs. Katakis’ mortgages were mentioned. It would seem probable that the new mortgages were considered to be entirely without effect. In spite of this defect in the particulars, I think that the requirements of the Companies Ordinance were sufficiently complied with. The particulars which the registrar is required to enter, as specified in s. 82 (1) are the date of the creation of the charge, the amount secured, short particulars of the property charged and the persons entitled to the charge. All these particulars were given. On the assumption I have made there would be not two charges, but one, though evidenced in two ways. The omission of reference to one of them could mislead no one as to the amount of the charge or the property charged. The object of similar legislation in England was stated by Buckley, J., in *In re Jackson & Bassford, Limited* (2), [1906] 2 Ch. 467 at p. 476 as follows:

“The object of that legislation is that those who are minded to deal with limited companies shall be able, by searching a certain register, to find whether the company has incumbered its property or not.”

In the present case there could, so far as I can imagine, be no prejudice to any creditor, and Guaranty Discount is entitled to the protection given by s. 82 (2) of the Companies Ordinance, which provides that the registrar’s certificate shall be conclusive evidence that the requirements as to registration have been complied with. In relation to s. 14 (c) of the Companies Act, 1900, which was in similar terms, Cozens-Hardy, M.R., said, in *In re Yolland, Husson & Birkett, Limited* (3), [1908] 1 Ch. 152 at pp. 158–9:

“Pausing there, that means not merely that he has done his mechanical duties, but that that has been done which is required to be done by any person upon whom a duty is imposed by this Act in order to get the benefit of the security, including the company itself.”

I think it is clear that if a charge was created on September 2 or 3, 1960, it was duly registered. That does not mean however, and counsel in this court did not contend, that registration could turn a bad charge into a good one, which brings me to the important question whether a charge was indeed created at the beginning of September or whether there was merely the continued existence of a charge created earlier.

The liquidator was of the opinion that the deposit of the title deeds on September 3, 1960, created a valid charge. In the High Court the learned judge found that the agreement of July 22, 1959, itself created an equitable charge on the properties, that when Guaranty Discount claimed that they were equitable mortgages by deposit and that there was no writing in support of the contract they were claiming something which was contrary to the facts; they were already mortgagees by virtue of the original agreement which was void for want of registration. I have already expressed the opinion that the agreement in question did constitute an equitable security at least from April 8, 1960, when the

requirement of the Governor's consent was terminated. Whether that is the end of the matter, as the learned judge considered, is a question which I must now proceed to examine.

To dispose of the matter, I would first mention that no question of fraudulent preference arises. The liquidator said that he could see no evidence of a dominant intention to prefer Guaranty Discount and that the sole intention was to discharge a legal obligation. There is no reference to the question in the judgment under appeal and it was not raised before this court.

I have not found any authority which exactly fits the present circumstances. The question, in its plainest terms, is to what extent or in what circumstances, one charge which purports to replace an earlier charge for the same loan can be said to "create" a charge. If the later charge is in respect of a different property or other security of course no question arises – that would be the creation of an entirely new charge. In the present case the charges relate to the same land. In *Esberger & Son, Limited v. Capital and Counties Bank* (4), [1913] 2 Ch. 366, which lays down a general rule that the date of creation of a mortgage or charge, is the date of its execution and not the date when money is subsequently advanced on it, an argument was advanced which might be relevant to the present circumstances, which are however not completely parallel. In *Esberger's* case (4), a company on September 10, 1910, deposited title deeds with its bankers with a letter from the chairman to the secretary of the company authorising the latter to deposit the deeds. On September 17, 1910, the company sealed and subsequently delivered to the bank a memorandum of deposit of the deeds, containing a charge. Counsel for the liquidator of the company argued at p. 368 of the report:

"The first objection to the alleged charge is that the loan which was secured by the document of September 17, 1910, was the same loan as that which was secured by the letter of September 10, 1910, and the deposit of deeds made on that day. That previous charge was void for want of registration under s. 93 of the Companies (Consolidation) Act, 1908; and was not bettered by the same charge for the same money being given over again a few days later."

In his judgment Sargant, J., said, at pp. 371–372:

"That being so, it was contended by Mr. Grant that the loan secured by the document of September 17, 1910, was really the same loan as that which had been secured by the letter of September 10, 1910, and the previous deposit of the title deeds, and that as the previous security had not been registered the security was necessarily bad. I should not be prepared to decide in favour of that contention without hearing a great deal more argument than I have heard. It seems to me to rather be in conflict with what was said by Buckley, J., in the two cases of *In re N. Defries & Co.*, [1904] 1 Ch. 37, and *In re Cardiff Workmen's Cottage Co.*, [1906] 2 Ch. 627, but as the matter does not, in my opinion, turn upon that, I say nothing more upon that point."

The first case mentioned there, *In re N. Defries & Co. Ltd.* (5), [1904] 1 Ch. 37, was one in which there had been an agreement to give debentures and the money was advanced on the agreement. Debentures were sealed but not issued; after the period of twenty-one days from the date of the agreement had expired, new debentures were sealed, issued to the lender, and registered. Buckley, J., held that in the circumstances time ran from the sealing and issue of the later debentures. I think, from the point of view of the present case, it is of interest to quote an interjection by the learned judge, during counsel's argument that in equity the charge was created when the money was advanced and the agreement arrived at. Buckley, J., said (at p. 39):

“The date at which the money was borrowed may be the date of the creation of the charge, but whether it is or not depends on the circumstances and the bargain between the parties.”

I will refer later to the second of the two cases mentioned by Sargant, J.

Reference to another decision of that learned judge is helpful as to another possible approach to the matter under consideration; it is the case of *In re Gregory Love & Co. Ltd.* (6) (1916), 85 L.J. Ch. 281. The facts were that there was an agreement to give debentures in certain events to a director who had given security over his own property for the company’s overdraft. The agreement was registered under s. 93 of the Companies (Consolidation) Act, 1908. The debentures were later given, but, for reasons which are not here material, they were invalid. Counsel sought to rely upon the original agreement, contending that in equity it created an equitable charge; it was as if the debentures had in fact been issued and could not be defeated by afterwards giving the lender an invalid debenture. What I find of interest in the judgment (which proceeded on other grounds) is the following passage, at p. 284:

“On these facts it seems to me that it is impossible to hold that the position of the plaintiffs is saved by the agreement in question. In the first place, it is not suggested that the third debenture was not precisely such a document as was contemplated by the agreement; and, this being so, there appears to have been so complete an execution or performance of the executory agreement as to leave no obligation or right still subsisting under it.”

There is an implication there that when you have a preliminary agreement, the terms of which are completely fulfilled, it is spent, and you must look to the replacing document for your charge. Even if the agreement had been duly registered, it would appear decidedly unsafe to leave the formal security unregistered, relying on an assertion that the charge had been registered when it was created under the agreement. Conversely, if the formal security does require registration there can be little reason for saying that the validity of that registration would be defeated by reason of the non-registration of the superseded agreement.

A further case bearing on this aspect of the matter is *In re Columbian Fire-proofing Company Limited* (7), [1910] 2 Ch. 120. There the lender advanced £350 on the strength of a resolution by the company that a debenture in his favour should be prepared and be executed at the next meeting of the board. The lender advanced a further £350 before execution of the debenture and £300 on its execution. Registration of the debenture was effected within twenty-one days of the date of advance of the final £300 but more than twenty-one days after the payment of either of the first two instalments. Cozens-Hardy, M.R., in his judgment said, at pp. 122–123:

“We are asked to say that these transactions, all of which took place in the interval of time between November 25, when the resolution was passed that Mr. Sankey should have a debenture, and December 6, when he got the debenture, are altogether void as to the earlier advance because the registration, although within twenty-one days from the giving of the debenture, was not within twenty-one days from the date of the first advance. I fail to find anything in the Act of Parliament which can justify such a conclusion. This is simply an ordinary case in which there is an agreement for a mortgage, which takes some time to prepare, and the preparation of which may involve considerations of title and so on, and in a case like this, where the formal instrument is executed within twenty-one days from the date of the prior agreement and where that formal instrument necessarily



supersedes and gives the go-by to the prior agreement, I think it would be shocking to hold that the transaction could be impeached on the ground that the security was created at the time when the money was advanced, that is to say, more than twenty-one days before the registration not of the agreement but of the security itself. I think that to lend any countenance to such a suggestion as to the meaning of s. 93 would be disastrous.”

There again is the concept of the formal instrument which “supersedes and gives the go-by” to the prior agreement, and I do not read the passage as indicating that the prior agreement must necessarily be one incapable of taking effect as an equitable security.

It is advantageous to consider briefly the question of prejudice to third parties which might arise from acceptance of the principle acted upon by the Master of the Rolls in the case last mentioned. There could be none to any creditor who had advanced money in the interim upon security (that is, between the unregistered agreement and the registered formal charge) for the creditor would have priority. As to unsecured creditors who had extended credit in the interim I think the position is best put by Buckley, J., in *In re Cardiff Workmen's Cottage Company Limited* (8), [1906] 2 Ch. 627, the second of the cases mentioned by Sargant, J., in *Esberger's* case (4). That was an application for extension of time in which to register a debenture, and the learned judge was considering whether there should be protection for persons who had given credit and were entitled to say they had done so on the footing that the debentures did not exist. At p. 630, he said of such persons:

“... and, if they were here (which unfortunately they are not), they might argue that justice requires that the status quo should, so far as they are concerned, be maintained. Upon the first consideration of the matter this might seem right, but the answer to it, I think, is as follows: If the company now cancelled these unregistered debentures they could issue to their late holders new debentures and register them within twenty-one days, and those debentures would be valid subject to attack (if attack could successfully be made upon them) upon the ground of fraudulent preference. The person who is at any moment the unsecured creditor of the company is always exposed to the danger that the company may execute in favour of other creditors incumbrances upon its property, and unless he can attack those securities on the ground of fraudulent preference they prevail as against him. So long as the company is a going concern the creditor who has obtained no charge upon property necessarily runs the risk of dispositions made by the company by sale, mortgage, or otherwise. I am conscious that this view renders the section of the Act of 1900 which requires registration of incumbrances of much less value. I incline to the opinion that when a case of sufficient magnitude arises it may be well to give notice to some of the unsecured creditors of substantial amount so as to give them an opportunity of being heard, if they so desire, upon the question of what is ‘just and expedient’ in their interest.”

There is I think an analogy between the extension of time there sought and the question of registration of a formal charge separated by an interval of time from an agreement to give that charge. While there is a possibility of occasional prejudice there would generally be no need to suppose that any greater body of creditors had dealt with the company with particular reliance on the register of charges at one point of time than at another.

The agreement in the present case was one which, had it been completed in accordance with the intention disclosed in it, I would say without hesitation fell within the principle acted upon by Cosens-Hardy, M.R., in *In re Columbian*

*Fireproofing Company Limited* (7). It was entered into on July 22, 1959, the money was to be advanced on July 31, 1959, and Crete Sisal was to execute first legal mortgages or charges forthwith. The intention obviously was to create that form of security, and the agreement did not in terms purport to create a charge itself. That it (in my opinion) did so in law is due to the operation of the general principles of equity. I note the following statement in Buckley on the Companies Acts (13th Edn.), p. 213, on the authority of *Brunton v. Electrical Engineering Corporation* (9), [1892] 1 Ch. 434:

“Semble, a right given by the general law, such as a vendor’s or solicitor’s lien, is not a charge ‘created’ by the company and does not therefore require registration.”

I doubt the application of that principle to the creation of an equitable mortgage by an agreement to give a legal one, but the parties in the present case undoubtedly contemplated that the formal mortgage would constitute the security, however ill-informed they appear to have been concerning the money and time that would be needed to get rid of Mrs. Katakis’ prior mortgages. Should the position be regarded as different because of the delay? Had the new mortgages been drawn as they ought to have been (leaving aside for the moment a further question respecting dates) so as to be fully effective and registrable, I would answer that question in the negative. They would themselves have created a charge in the sense that the agreement to mortgage was spent and could no longer be looked to as security, and in the sense that the charge created was a charge on the legal estate whereas that created by the agreement operated only on the equity of redemption and subject to Mrs. Katakis’ mortgages. They created (or would have if properly drawn) for the first time, the security always intended by the parties.

Unfortunately the mortgages were not properly drawn and failed of their full effect. They, with the deposit of title deeds operated only as equitable mortgages. Even that, in the very special circumstances of the case, I think would not have deprived Guaranty Discount of the benefit of registration had the transaction been in the simple terms I have been assuming. In actual fact, however, there was the serious complication that the new mortgages had been signed as early as February 26, 1960, by Crete Sisal and forwarded to Guaranty Discount on March 21, 1960. It is stated in Buckley (*supra*) at p. 213 that in the normal case of a mortgage by deed the charge is created when the instrument is executed by the [borrowing] company even though it is executed by the other parties later. No particular authority is quoted, but I have no reason to dissent if the mortgage then became effective as a security in favour of the mortgagee. In the present case I find it impossible to say that an equitable mortgage was not created on March 21, 1960, at the latest. So far as the new mortgages were concerned the agreement was “spent” at that date, though the obligation to obtain the discharges of Mrs. Katakis’ mortgages remained. The new mortgages could not take effect according to their tenor for they were not made subject to Mrs. Katakis’ mortgages, but that would not prevent the creation of a charge in equity over the full interest of Crete Sisal, whatever it might be. The equitable nature of the charge would not be altered by the subsequent deposit of the certificates and document of title. The only material difference brought about on September 3, 1960, was that the discharges of Mrs. Katakis’ mortgages were handed over. Though the equitable mortgage of Guaranty Discount would then operate against the full interest on the land I do not think it can be said that a new charge was created thereby – it was only the extinction of a prior charge, and by reason of the defect in the new mortgages the security of Guaranty Discount remained an equitable one. Can it be said that at the stage when the certificates and document of title were handed over that transaction added or created a new charge? As has been said earlier, a



deposit of title deeds with intent to create a security will per se constitute an equitable mortgage. The intent in this case was obviously that the title deeds should be held with the legal mortgages and would in one sense at least form part of the security in that their possession by Guaranty Discount would be a safeguard against possible attempted fraudulent dealings with the property. That aspect of the security would be even more important in the light of the fact that the new mortgages were found to amount to equitable mortgages only. Nevertheless, I cannot see that the possession of the deeds would operate so as to add anything to the equitable mortgage already existing so far as the land was concerned. Counsel for the respondents referred the court to the case of *Hari Sankar Paul v. Kedar Nath Saha* (10), [1939] 2 All E.R. 737, and I have examined the judgment in that case and those in the cases of *Obla Sundarachariar v. Narayanna Ayyar* (11) (1931), 58 I.A. 68, *Subramonian v. Lutchman* (12) (1922), 50 I.A. 77, and *Pranjivandas Mehta v. Chan Ma Phee* (13) (1916), 43 I.A. 122, which preceded it. They differentiate between cases of equitable mortgage where the security is the deposit of deeds and those where the memorandum accompanying the deposit is the operative instrument creating the security. More important perhaps, than the actual decisions, is the underlying principle which is embodied in an extract from a speech of Lord Cairns in *Shaw v. Foster* (14) (1872), L.R. 5 H.L. 321, 341, but I will set out part of the judgment of the Privy Council in *Pranjivandas Mehta v. Chan Ma Phee* (13) at p. 125, which embodies the extract referred to:

“The law upon this subject is beyond any doubt: (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster*, ‘Although it is a well-established rule of equity that a deposit of a document of title, without more, without writing, or without word of mouth will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed’.”

These decisions turn to a large extent upon matters of evidence with which this court is not concerned; nor do we have here a memorandum of deposit in the ordinary sense. The difficult question is whether, when an intended legal mortgage fails of its effect and takes effect as an equitable mortgage, and there is also a deposit of title deeds, a mortgagee can (and in this case did) elect to disregard the written equitable mortgage and rely for his security on the deposit of the deeds. The cases I have referred to indicate that the writing must be looked at to ascertain or determine the terms and extent of the security but do not, as I understand them, decide that the security itself, whatever its extent, does not flow as well from the deposit of the deeds as from the writing. I think a charge could have two sources in that way so that if one of them failed completely for some reason the other could be relied upon. In the present case the sources did not arise at the same time, but if, as a question of fact, the position could be equated to that which arose in *In re N. Defries & Co. Ltd.* (5) then time for the purposes of s. 79 of the Companies Ordinance might well be permitted to run from the date of deposit of the certificates and document of title. In that case debentures were sealed but not issued or delivered to the lender, and were cancelled. New debentures were then issued and it was held that

registration thereof within twenty-one days thereafter was valid, the basis of the decision being, I think, that the earlier issue did not take effect as a security at all. I do not think that can be said, on the evidence, of the new mortgages. I think it is clear that the certificates and document of title were delivered pursuant to obligations entered into under the agreement of July 22, 1959, as ancillary to the new mortgages. According to the affidavit of the secretary of Guaranty Discount he took the new mortgages and releases to Dar-es-Salaam for registration on or about September 4, 1960. As I mentioned earlier in this judgment the land officer on behalf of the Governor gave his consent on September 8, 1960, and it must be assumed that it was about that time that the defects in the documents were discovered. The position was then that Guaranty Discount held mortgages which they had believed to be legal mortgages but in fact amounted to equitable mortgages only (and which had not been registered timeously with the Registrar of Companies) and title deeds recently received. Had the new mortgages been in fact what they were believed to be they would still have taken effect as equitable mortgages from the time of their delivery to Guaranty Discount and required registration under s. 79. Such security as they afforded was not at any time terminated. I am in serious doubt on the question but whatever might be the position between Guaranty Discount and Crete Sisal, for the purpose of the Companies Ordinance I do not think it was open to Guaranty Discount unilaterally to disregard what had gone before and to claim that their charge over the land was created when they received the certificates and document of title. It is in my view more in accord with what was said in *Shaw v. Foster* (14) to regard the new mortgages as embodying the true transaction between the parties; it follows that time ran, for the purposes of s. 79, from the date of delivery of those mortgages.

Counsel for Guaranty Discount sought to counter this argument in relation to the registered land by reference to s. 91 of the Land Registration Ordinance, which provides (with some exceptions not relevant here) that no deed shall be registered unless executed by all persons who are parties thereto. Under the Ordinance all dispositions must be by deed and a mortgage is a disposition. I do not, with respect, think this is a valid argument. Signature by all parties is a condition precedent to registration, without which (by s. 41 (2)) no disposition shall be effectual to create, transfer, vary or extinguish any estate or interest in registered land. But it has not been contended that an equitable charge cannot be created without registration and for that purpose only the signature of the person giving security would be required.

No submissions on this aspect of the matter were made by counsel in relation to the unregistered land, though the provisions of the Registration of Documents Ordinance provide material for argument. It may well be that, in the absence of any charging clause, the mortgage of this land did not fall within the compulsory registration provisions; in the absence of any submission on the subject or any argument to the contrary I am not prepared to hold that it did not also operate as an equitable mortgage from the date of its delivery. For the reasons given I take the view that a charge was created by the new mortgages in March, 1960, and the events of September 2 and 3, 1960, did not so materially affect it as to entitle the court to say that a new charge was then created which could be protected by registration at that stage.

Counsel for Guaranty Discount next based an argument (not, I think, put forward in the court below) upon the provisions of s. 64 of the Land Registration Ordinance. It would apply only to the registered land. Sub-s. (1) and sub-s. (3) of that section read:

“64(1) Any person with whom a certificate of title has been deposited with the intention of creating a lien thereover may give to the registrar

notice in the prescribed form of such deposit and thereupon the registrar shall enter the same in the land register as an incumbrance.

- (3) Where a memorial of a notice of deposit has been entered under sub-s. (1) –
- (a) no transfer of the estate to which the certificate of title relates shall be registered until such notice has been withdrawn:
- Provided that a transfer of part of the land therein comprised free from such lien may be registered with the consent in writing of the person who gave the notice; and
- (b) no other disposition of that estate shall be registered unless the consent in writing of the person who gave the notice is produced to the registrar.”

Counsel’s submission was that the words “creating a lien thereover” in sub-s. (1) related to a lien over the documents themselves and not over the land to which they referred. As such the lien was not included in the categories of charges requiring registration specified in s. 79 (2) of the Companies Ordinance. That is a possible construction but the proviso to sub-s. (3) (a) speaks of the transfer of part of the “land” free from such lien which indicates an intention that the lien should attach to the land. The prescribed form of notice of deposit reads:

“HEREBY GIVE NOTICE that the certificate of title to the estate registered under the above reference has been deposited with me with the intention of creating a lien thereover.”

I think that rather favours the lien attaching to the land as there would otherwise be no need for the words “to the estate”. I consider that the proper construction of the section is that it is intended to provide a method more efficacious than caveat of protecting an equitable mortgage or charge and relates to a lien on the land. There is of course no hint anywhere that the intention of the parties was to restrict the security to a pledge of the documents themselves. I think that Guaranty Discount cannot succeed on this ground.

I must now consider the last ground of appeal which is that Guaranty Discount is entitled to be subrogated to the charge of Mrs. Katakis so far as it was paid off out of moneys provided by Guaranty Discount. The learned judge in the High Court thought that there was insufficient material before him to decide the question, but I think it can well be decided in principle, subject to a question of amount to be decided by the liquidator should the decision go in favour of Guaranty Discount.

Reference was made in argument to *Chetwynd v. Allen* (15), [1899] 1 Ch. 353, *Whiteley v. Delaney* (16), [1914] A.C. 132, *Gokuldoss Gopaldoss v. Rambux Sevchand* (17) (1884), 11 I.A. 126, *Butler v. Rice* (18), [1910] 2 Ch. 277, and *Ghana Commercial Bank v. Chandiram* (19), [1960] A.C. 732. In the judgment of their lordships in the Privy Council in the case last mentioned, *Butler v. Rice* (18) was given as the authority for the following general statement of the law, at p. 745:

“It is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit:”

This is what happened in the present case, though the first of the two amounts paid for this purpose was not paid to Mrs. Katakis direct. It was paid to Crete Sisal for payment to her but as Crete Sisal had undertaken a legal obligation

to make that payment, I think that makes, in my opinion, no difference at all. The additional money paid on September 3, 1960, in exchange for the certificates and document of title and releases of mortgages, was paid direct to Mrs. Katakis' advocates.

The question then arises whether the presumption that Mrs. Katakis' security was to be kept alive was negated by the fact that Guaranty Discount intended to take legal mortgages, and but for mutual error would have done so. I think a full answer to that question is to be found in the case of *Ghana Commercial Bank v. Chandiram* (19). The facts appear from the headnote:

"A debtor, the owner of certain real property, on July 16, 1954, created an equitable mortgage on it in favour of the B. Bank by deposit of the title deeds to secure the payment and discharge of his liabilities to that bank. On September 4, 1954, at the request of the debtor the deeds were sent to the appellant bank with the permission of the B. Bank against the appellant bank's undertaking to hold them on the B. Bank's behalf. On September 24, 1954, a writ of fieri facias for the attachment of the property was issued at the instance of a judgment creditor pursuant to O. 43 of the Ghana Supreme Court (Civil Procedure) Rules, 1954, which, by r. 7, prohibited the debtor from 'alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise', and by r. 11 provided that any alienation without leave of the court after attachment should be null and void.

"On October 27, 1954, the debtor executed a legal mortgage of the property in favour of, and conveyed the property to, the appellant bank to secure repayment of money owing or to become owing by him to that bank, and on the same day the appellant bank paid to the B. Bank the sum owing to it by the debtor on the security of the equitable mortgage, retaining in their custody the deeds which had been passed to them."

It was held that the legal mortgage of October 27, 1954, was null and void by reason of the Ghana Supreme Court (Civil Procedure) Rules and in that respect the case is on all fours with the present one, in which an intended legal security likewise failed of effect. It was held also that the attachment took effect subject to B. Bank's equitable mortgage and the benefit of the mortgage continued to be capable of assignment or devolution on equitable principles or otherwise. Accordingly the appellant bank, on paying B. Bank became entitled to the benefit of the equitable security. I come now to the passage in the judgment (at p. 745) which deals with the point under discussion:

"In the present case it has been contended that the execution of the abortive legal mortgage sufficed to negative any such intention. Their lordships cannot agree. While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit save in so far as it was so replaced: see *Butler v. Rice* and *Chetwynd v. Allen*."

A very similar position arose in *Butler v. Rice* (18) but I do not need to go further into the matter: it appears clear that on the authority of *Ghana Commercial Bank v. Chandiram* (19) Guaranty Discount is entitled to the benefit of the security of Mrs. Katakis' mortgages (the releases of which were not registered) to the extent of such moneys as were paid by Guaranty Discount directly

or indirectly to Mrs. Katakis and were owing or agreed to be owing on her mortgages. It would seem that a good deal more was paid than was originally contemplated. There would undoubtedly be subrogation to the extent of the sum paid pursuant to the agreement of July 22, 1959; whether the sum of Shs. 245,540/10 paid on September 3, 1960, would be included depends on a question of fact. If the amount was paid with the concurrence of Crete Sisal there would be subrogation to the extent of the sum which was in fact owing. Guaranty Discount is entitled to claim as a secured creditor to the extent of the subrogation, which would have to be decided by the liquidator.

In my judgment the appeal should be allowed only to the extent that Guaranty Discount be admitted as a secured creditor in relation to the land covered by Mrs. Katakis' mortgages to the extent of the subrogation indicated earlier in this judgment. As my opinion is in the minority it is not necessary for me to suggest the terms of any formal order.

**Newbold JA:** This appeal raises two questions arising out of a liquidation: first, is the appellant a secured creditor by virtue of any equitable charge?; and, secondly, is the appellant a secured creditor by reason of subrogation?

The essential facts are that on July 22, 1959, the appellant and a company, whom I shall call shortly Crete Sisal, entered into an agreement whereby the appellant undertook to lend Crete Sisal Shs. 1,300,000/-, a part of which was to be applied towards the complete repayment of two specified creditors of Crete Sisal and the balance was to be applied towards the repayment of a debt owed by Crete Sisal to a Mrs. Katakis and in respect of which she held a first mortgage over four properties owned by Crete Sisal. This balance, as appears from the agreement, was insufficient to repay completely the debt owed by Crete Sisal to Mrs. Katakis. The agreement set out that Crete Sisal was to give the appellant a first mortgage over the four properties. In accordance with the agreement the money was advanced to Crete Sisal and the two specified creditors were paid off. Documents which apparently were intended to be legal mortgages of the four properties were prepared and executed by Crete Sisal in February, 1960, and by the appellant on September 2, 1960. In fact these documents were ineffective as legal mortgages. It appears that Crete Sisal had not discharged the debt due to Mrs. Katakis and before releases of her first mortgages could be obtained the appellant had to pay to the advocates for Mrs. Katakis a further Shs. 245,640/10. This payment was made on September 3, 1960, whereupon the advocates for Mrs. Katakis handed to the appellant the releases and, in accordance with instructions from Crete Sisal, the title deeds to the properties. On October 3, 1960, the appellant in accordance with s. 79 of the Companies Ordinance registered a charge over the immovable property of Crete Sisal. A certificate of such registration was issued and the particulars of such certificate state that the charge was not created by an instrument but by deposit of title deeds and was for Shs. 1,300,000/-.

Subsequently Crete Sisal went into liquidation and the appellant proved in the liquidation for a total amount of Shs. 1,596,282/59 and claimed to be a partly secured creditor by virtue of a deposit of title deeds, the security being valued at Shs. 400,000/-. This claim was resisted by the respondents, who were also creditors in the liquidation of Crete Sisal. The liquidator held that the appellant was a secured creditor by virtue of the deposit of the title deeds. On appeal to the High Court this finding was reversed, the High Court holding that the appellant was an equitable mortgagee by virtue of the agreement of July 22, 1959, and that this charge had not been registered in time. The learned judge was, without so finding, inclined to the view that the title deeds were merely handed over by virtue of the agreement and were not delivered with intent to create an equitable mortgage.

As regards the first question, I shall assume, without however coming to any conclusion on the point, that both the agreement of July 22, 1959, and the ineffective legal mortgages created equitable charges over the properties. It is quite clear that these equitable charges were never timeously registered under s. 79 and this being so the charges so created are void against the liquidator and any creditor of the company. The appellant did submit that the particulars set out in the certificate of registration were wide enough, on the authority of *National Provincial and Union Bank of England v. Charnley* (20), [1924] 1 K.B. 431, to cover any equitable charge arising under the ineffective legal mortgages, but I reject this submission. The *National Provincial Bank* case (20) is authority for saying that, where the certificate refers to an instrument, then any charge created by the instrument is duly registered. It is not authority for saying that, where the certificate refers to the charge as being created by deposit of title deeds and not by an instrument, then any charge created by an instrument over the specified lands for the specified figure is thereby registered. The answer to the first question hinges on whether the title deeds were deposited with the appellant in circumstances which created a charge. It is immaterial whether, as I have assumed is the position, there exist earlier equitable charges which have not been registered. The point is did the deposit of the title deeds create a new charge? If it did the appellant is perfectly entitled to say: "I rely on the charge created by the deposit of the title deeds and I am not concerned with whether or not any earlier charge was also created". That this is the position is, in my view, clear for a number of reasons. First, s. 79 requires a charge to be registered within a certain period after its creation. If, therefore, a new charge is created it is immaterial whether or not an earlier charge exists. Secondly, to hold otherwise would be to deprive the holder of a charge which had not been timeously registered from taking any steps which would enable him to obtain an effective security against the liquidator and creditors of the company. Thirdly, the cases of *In re N. Defries & Co. Ltd.* (5) and *In re Cardiff Workmen's Cottage Company Limited* (8) would appear to decide that the same loan may be secured in two different ways, and this would also appear to be the view of Sargant, J., at p. 371 in *Esberger & Son Limited v. Capital and Counties Bank* (4).

Turning now to the question of whether the deposit of the title deeds created an equitable charge, it is to be noted that the amount of Shs. 1,300,000/- set out in the agreement and in the ineffective legal mortgages was not sufficient to enable Mrs. Katakis' mortgages to be discharged and that the appellant had to advance a further sum of some magnitude. In other words, the loan in respect of which an equitable charge was created by the agreement and the ineffective legal mortgages only formed part of the loan which the appellant had to make before he could obtain the releases of Mrs. Katakis' mortgages and the deposit of the title deeds. To say that the title deeds were handed over by reason of the loan of Shs. 1,300,000/- or in pursuance of the agreement or the ineffective legal mortgages is manifestly incorrect. It is quite clear that the title deeds would not have been deposited with the appellant unless a further loan had been made, and the advocates for Crete Sisal in their letter of September 2, 1960, only authorised the advocates for Mrs. Katakis to hand over the title deeds "against such payment". In these circumstances I fail to see how it can be suggested that title deeds which are handed over by a debtor to a creditor against the payment of a sum additional to an amount previously borrowed on the security of the four properties can be said to have been done without the intention thereby to charge the properties with the full amount advanced by the creditor on such security. It is clear that neither the agreement nor the ineffective legal mortgages would create equitable charges for anything more than Shs. 1,300,000/-. But it is suggested that the title deeds were handed over merely in pursuance of those equitable charges. In other words, although in fact the title deeds were only handed over against the payment of a further considerable



sum of money, that sum was to be completely unsecured. That would be the invocation of equitable charges in order to defeat equity – a strange doctrine and one to which I will not subscribe! Where title deeds are handed over by a debtor to a creditor against the payment of money a very strong presumption arises that the deposit has been made with a view to the creation of an equitable mortgage over the entire interest of the debtor in the properties concerned and for the entire amount then due by the debtor to the creditor and which the facts show was advanced against the security of the properties. There is not a title of evidence in this case which rebuts this presumption. Instead, by reason of the creation of earlier equitable charges for a specified sum it is sought to draw inferences which would deny the creation of a later equitable charge for a larger amount. It is not clear to me how it can be said that the title deeds were deposited otherwise than with the intention of creating a security. Their deposit certainly was not necessary for the purpose of the agreement nor in pursuance of the terms of the agreement. The terms of the ineffective legal mortgages did not require their deposit and their deposit was unnecessary for the purposes of the registration of the ineffective legal mortgages as in any event the ineffective legal mortgages of three of the properties was not in a form which permitted of registration. The fact that the certificate of registration referred to the deposit as being security for the sum of Shs. 1,300,000/- and not the full amount of over Shs. 1,500,000/- is immaterial – the only result of this would be, if the properties were worth a sum in excess of Shs. 1,300,000/-, that the difference could not be secured as against the liquidator and creditors of the company.

I am therefore satisfied that the appellant is a secured creditor by virtue of the deposit of the title deeds. It is not in dispute that any such charge was timeously registered.

In these circumstances it is unnecessary to consider the question of subrogation. As it was argued fully I think I should state that the decision in *Ghana Commercial Bank v. D. T. Chandiram and Another* (19) is clear authority for saying that in any event the appellant would be entitled to be subrogated to the charge of Mrs. Katakis to the extent to which her debt was paid off out of moneys provided by the appellant.

For these reasons I would allow the appeal with costs, to be paid equally by the respondents, set aside the judgment and order of the High Court and substitute therefore an order dismissing the consolidated applications with costs to be paid equally by the applicants. I would also give a certificate for two counsel.

**Sir Ronald Sinclair P:** I have had the advantage of reading the judgments prepared by my brethren. For the reasons given by the learned Acting Vice-President I agree that the two mortgages which were ineffective as legal mortgages took effect as equitable mortgages from the date of their delivery to Guaranty Discount, namely March 21, 1960, and required registration under s. 79 of the Companies Ordinance. Those mortgages were not timeously registered in accordance with the provisions of s. 79 and are accordingly void as against the liquidation and creditors of Crete Sisal.

The question which I find of great difficulty is whether the deposit of the title deeds with Guaranty Discount on September 3, 1960, created a new equitable charge over the properties on that date. A deposit of title deeds with intent to create a security gives an equitable charge. What was the intent in the present case? As between a debtor and his creditor the mere fact of possession of title deeds by the latter raises a presumption that they were deposited with him as security for his whole debt. Here the title deeds were deposited, not with the mortgages, but some months later and upon a further advance of a very substantial sum not covered by the mortgages. The advocates for Crete Sisal

authorised Mrs. Katakis' advocates to hand over the title deeds to Guaranty Discount only against payment of the further advance and they would not have been delivered to Guaranty Discount without such payment. In my view the inference is that the title deeds were deposited with intent to create a security – a new charge – and not merely in pursuance of the mortgages or the prior agreement. Some support for that view is, I think, to be found in the notice of deposit of certificate of title dated September 5, 1960, which was registered on behalf of Guaranty Discount in the Land Registry on September 7, 1960. That notice states that the certificates of title to the registered land had been deposited with Guaranty Discount “with the intention of creating a lien thereover”. In all the circumstances I have come to the conclusion, though with considerable hesitation, that the title deeds were deposited with the intention thereby of charging the properties with the total amount advanced by Guaranty Discount on such security. I am therefore in agreement with Newbold, J.A., that Guaranty Discount is a secured creditor by reason of the deposit of the title deeds.

It is therefore unnecessary to consider the question of subrogation, but I think I should state that I am in complete agreement with the reasoning and conclusions of the learned Acting Vice-President on that question.

The appeal is accordingly allowed with costs, to be paid equally by the respondents, the judgment and order of the High Court are set aside and an order dismissing the consolidated applications with costs to be paid equally by the respondents is substituted therefor. There will be a certificate for two counsel.

*Appeal allowed.*

For the appellant:

*JM Nazareth, QC and NS Patel*  
*Patel & Co, Dar-es-Salaam*

For the first respondent:

*B O' Donovan, QC and AJ Kanji*  
*Satchu & Satchu, Dar-es-Salaam*

For the second respondent:

*B O' Donovan, QC and M Riegels*  
*Dodd & Co, Dar-es-Salaam*

**Dracaku s/o Afia and another v R**  
**[1963] 1 EA 363 (CAK)**

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|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Kampala                            |
| <b>Date of judgment:</b> | 23 July 1963  |
| <b>Case Number:</b>      | 12/1963   |
| <b>Before:</b>           | Sir Trevor Gould Ag P, Crawshaw Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |



**Appeal from:** High Court of Uganda – Jeffrey Jones, J

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*[1] Criminal law – Murder – Common intention – Two assailants – Each strikes deceased a blow – Blows struck one after the other – Insufficient evidence to establish which blow caused death – Whether finding of common intention justified – Whether second assailant aider and abettor of the first – Penal Code, s. 22 and s. 228 (U.) – Criminal Procedure Code, s. 180 (U.) – Eastern African Court of Appeal Rules, 1954, r. 41 – Appellate Jurisdiction Act, 1962, s. 4 (3) (U.).*

### **Editor's Summary**

At the trial of the appellants on a charge of murder the evidence was that the first appellant struck the deceased one blow on the head with a stick and the deceased fell to the ground. The second appellant then picked up a stick and hit the deceased on the head as he lay on the ground. The medical evidence did not establish which blow caused the fatal injury or that both blows were fatal but the judge in convicting the appellants of murder came to the conclusions that they had acted in concert to beat the deceased, and that the case fell within the definition of “common intention” in s. 22 of the Penal Code. On appeal,

**Held –**

- (i) the case presented against the appellants did not support a finding of common intention so as to invoke s. 22 of the Penal Code; nor could the second appellant be regarded as an aider and abettor of the first.
- (ii) the principle applicable to aiding and abetting is that the person accused thereof must be present encouraging or assisting at the time of the commission of the offence and, as the crime of the first appellant was complete before the second appellant struck, the two incidents must be regarded as separate offences.
- (iii) each appellant was guilty of assault occasioning actual bodily harm contrary to s. 228 of the Penal Code and a conviction under this section should be substituted in the case of each appellant under s. 180 of the Criminal Procedure Code.

Appeal allowed. Conviction of murder quashed and sentence set aside. Conviction under s. 228 of the Penal Code substituted.

**Cases referred to in judgment:**

- (1) *King v. R.*, [1962] 1 All E.R. 816.
- (2) *R. v. Abbott*, [1955] 2 All E.R. 899
- (3) *R. v. Richardson*, 168 E.R. 296.
- (4) *R. v. Mikaeri Kyeyune and Others* (1941), 8 E.A.C.A. 84.
- (5) *R. v. Tabulayenka and Others* (1943), 10 E.A.C.A. 51.
- (6) *Tindira and Another v. R.* (1951), 18 E.A.C.A. 180.
- (7) *R. v. Macklin Murphy and Others* (1838), 2 Lew. C.C. 225.
- (8) *Robert Ndecho and Another v. R.* (1951), 18 E.A.C.A. 171.

**Judgment**

**Sir Trevor Gould Ag P:** read the following judgment of the court: The two appellants were convicted in the High Court of Uganda at Arua of the murder of Adeboa s/o Muu at Tamira Village, West Nile District on August 12, 1962.

The facts were established by adequate evidence. On the date mentioned there was a funeral party at the house of Oye, whose wife had died. The two appellants, who were related to the deceased wife, were present, as was Adeboa (hereinafter referred to as “the deceased”) who was a cousin of Oye. In accordance with custom Oye had given a cow to the relatives and Shs. 12/- to buy arrows; he also gave a chicken to the first appellant. After the funeral the first appellant demanded more chickens and started to chase one. One Adaki, a brother of the female (second) appellant, also demanded chickens and slapped Oye. The deceased intervened in the altercation between Adaki and Oye. The first appellant then picked up a stick from the granary, about five feet long and from three to four inches thick and struck the deceased one blow on the head. The deceased fell down. The second appellant picked up a stick, about three feet six inches long and from one and a half to two inches thick, and hit the deceased on the head as

he lay on the ground. Oye said that the first appellant's blow was on the side of the head, but two other eye witnesses said it was on the back of the head. The three eye witnesses were unanimous in saying that the blow by the second appellant fell on the forehead. The appellants, having struck one blow each, ran away leaving the sticks on the scene. The deceased died shortly afterwards, and a post mortem examination of his body was carried out by the district medical officer. The medical officer said in evidence:

“There were no cuts but I found marks of blows on the head, both in front and back. Internally I found a depressed fracture of the skull.

“Cause of death: Damage to the brain caused by the depressed fracture. The injury was caused by a blunt instrument such as a stick. Either of the sticks shown to me could have caused them, but the heavier of the two is the more likely one.”

He said further:

“Exhibit 3 could cause the death of a person. Depressed fracture was under one blow. It could have been caused by either exhibit 3 or exhibit 4.”

Exhibit 3 is the lighter stick, used by the second appellant and exhibit 4 the heavier one. In the absence of any indication in the medical evidence whether the depressed fracture was related to a blow on the front or the back of the head it is clearly impossible to say which blow caused the injury resulting in death. It is also impossible to say that each of the two blows described by the witnesses must necessarily by itself have caused death – the medical evidence that the depressed fracture was “under one blow” indicates the contrary. It must therefore be accepted that one of the appellants struck a blow, with whatever intent, which would not have caused death, and that it is not possible to say which appellant that was. It follows that neither is liable to be convicted of murder unless it is proved that the appellants had a common intention to attack the deceased with intent to cause him grievous harm, or that one aided and abetted the other in such an attack with the like intent: *King v. R.* (1), [1962] 1 All E.R. 816; *R. v. Abbott* (2), [1955] 2 All E.R. 899; *R. v. Richardson* (3), 168 E.R. 296.

In the Uganda Penal Code common intention is dealt with in s. 22:

“22. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The learned judge in the High Court considered that the case fell within that section for he said, without amplification:

“I have considered the evidence carefully and I have no doubt that the two accused acted in concert to beat the deceased and must have known the probable consequences of the beating, that is, the possibility of death ensuing, which it did.”

It is not an easy case and the evidence as to the timing of the acts of the two appellants is not meticulously clear, but with respect, we find ourselves unable to agree with the learned judge’s conclusion. There is of course no evidence of any agreement formed by the appellants prior to the attack made by each, but that is not necessary if an intention to act in concert can be inferred from their actions. The learned judge may have had in mind such cases as *R. v. Mikaeri Kyeyune and Others* (4) (1941), 8 E.A.C.A. 84 and *R. v. Tabulayenka and Others* (5) (1943), 10 E.A.C.A. 51, in each of which a number of persons took part in beating a thief and common intention was inferred. We do not find the present case to be parallel. There was no proved association or relationship between the two appellants other than they were relatives of Oye’s wife and were both at the funeral party. The description of the attacks given in evidence by Oye was:

“Adeboa came when Adaki slapped me, and separated us. The first accused gave up chasing the chickens and picked up exhibit 4 (stick about five feet long and three to four inches thick), from a granary. He came and struck deceased on the right side of the head. He beat him once. Adeboa fell down at once. Then the second accused took a stick also from a granary.

This is it (exhibit 3) (about one and a half to two inches thick, about three feet six inches long). She hit Adeboa on the head too. It was on the forehead – when Adeboa was on the ground.”

The evidence of the other two eye witnesses agreed generally with that version. The impression given there is of two separate incidents though the second no doubt followed closely on the first. The first appellant got a stick from a granary and struck the deceased, who fell down. “Then” the second appellant did likewise. There is no evidence that the first appellant had continued to attack the deceased, and the eye witnesses’ evidence was that only two blows were struck, one by each appellant. The learned judge in his judgment said that the medical officer saw three marks of blows on the head, but his evidence has been set out above, and we are unable to find any statement or inference to that effect. It must therefore be accepted that, by the time the second appellant arrived and struck her blow, the attack of the first appellant, consisting as it did of a single blow, was terminated. In our opinion the facts of the case are not greatly dissimilar from those in *Tindira and Another v. R.* (6) (1951), 18 E.A.C.A. 180, in which it was held that there was no common intention. The facts as set out in the judgment, at p. 180, were:

“The facts which the learned trial judge found proved are that the two appellants, who were drunk and armed with sticks, intervened in a quarrel, which arose over a woman; the deceased, who was unarmed, came up and asked what was going on whereupon the second appellant hit him a blow on the left temple with a bamboo stick causing deceased to fall on his hands. As he was about to get up the first appellant hit him over the head with a heavy pole and the deceased fell to the ground unconscious. The appellants ran away but were captured.”

We think that the evidence of independent action in the present case is stronger than in *Tindira’s* case (6), and are satisfied that the case presented against the appellants did not support a finding of common intention so as to invoke the provisions of s. 22 of the Penal Code. For the same reasons we are of opinion that the second appellant cannot be regarded as an aider and abettor of the first. The facts may be very close to the class of case described in Kenny’s *Outlines of Criminal Law* (17th Edn.), at p. 20, as follows:

“Thus if one person were engaged in murderously beating another to death and a stranger, without being requested, were to rush in and add some more blows so that the victim’s death were more speedily brought about, both would be guilty of murder and the first man could not be allowed the defence that it was the second assailant’s strokes that finally ended the victim’s life.”

In *Russell on Crime*, it is said (11th Edn.), at pp. 33, 34:

“It may be stated as a general rule that when A intentionally participates in what he knows B to be doing, then the result of their combined activity will be considered in law to be no less the actus reus of A than it may be of B; and this will be so whether or not B wished for or knew of A’s action in the matter. Nor will it make any difference if A’s contribution to the affair be superfluous or even ineffective. For example, if C, a stranger, sees A engaged in kicking B and thereupon, without being in any way invited to do so by A, should join in and himself make an attack on B then, however innocuous his own attack on B may be, he will make himself responsible (of course to the extent that he has the appropriate mens rea) for whatever actus reus this combined attack may inflict on B.”

The authority quoted for that passage, *R. v. Macklin Murphy and Others* (7) (1838), 2 Lew. C.C. 225, does not appear clearly to cover the whole of its contents, but we have no reason to doubt that it correctly expresses the law. It covers the class of case in which one party decides to aid and abet another without the knowledge or consent of the latter, which is not common purpose in the full sense of the phrase: the question then becomes one of ascertaining the extent of the mens rea in each. But the principle applicable to aiding and abetting is that the person accused thereof must be present encouraging or assisting at the time of the commission of the offence. Professor Glanville Williams in his book on Criminal Law (2nd Edn.), at pp. 354, 355, points out that “the time of the crime” is interpreted broadly so that in burglary a conspirator present or assisting at the breaking is a principal in the second degree even though absent during the entry. On the view of the evidence which we have taken in the present case we do not think that is a possible approach here. The crime of the first appellant was complete and he had desisted before the attack of the second appellant took place, and although it is a matter of degree and the dividing line is narrow we think that here the two incidents must be regarded as separate offences.

Section 180 of the Criminal Procedure Code of Uganda reads:

“180. When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he may be convicted of the minor offence although he was not charged with it.”

This court has all the powers of the court from which the appeal is brought (r. 41 of the Eastern African Court of Appeal Rules, 1954, and s. 4 (3) of the Uganda Appellate Jurisdiction Act (No. 1 of 1962)). The principle upon which the power is to be exercised was expressed by this court in *Robert Ndecho and Another v. R.* (8) (1951), 18 E.A.C.A. 171 (though the section there under consideration did not contain the word “cognate”), at p. 174, as follows:

“In order to make the position abundantly clear we restate again that the judgments of this court given in *R. v. Muhoja* (1942), 9 E.A.C.A. 70 and *R. v. Home* (1944), 11 E.A.C.A. 107, mean nothing more than this: where an accused person is charged with an offence he may be convicted of a minor offence although not charged with it, if that minor offence is of a cognate character, that is to say of the same genus or species. Furthermore we point out that the wording of s. 179 (2) is permissive only and that in our opinion, when the major offence charged is murder, a court should exercise its discretion most warily before convicting a person charged, with any alternative offence, although cognate, other than manslaughter. The test the court should apply when exercising its discretion is whether the accused person can reasonably be said to have had a fair opportunity of making his defence to the alternative.”

In the present case it is abundantly clear that each appellant was guilty of assault occasioning actual bodily harm, which is a misdemeanour punishable by five years’ imprisonment under s. 228 of the Penal Code. Their defences were the same – that they did not participate in any attack as alleged – and it cannot be said that they were in any way prejudiced because they were not facing an actual charge under s. 228. The offence under that section is minor and cognate and we are satisfied that the power given by s. 180 of the Criminal Procedure Code should be exercised in the present case.

We accordingly allow the appeals, quash the convictions for murder and sentences of death, but substitute in the case of each appellant a conviction of the offence of assault occasioning actual bodily harm contrary to s. 228 of the Penal Code. As to sentence, we take into account that the appellants have been

in custody for approximately nine months. We consider that the first appellant was the initiator of the attack and therefore more blameworthy than the second appellant who followed his example. The first appellant is sentenced to imprisonment for a term of three and a half years and the second appellant for a term of two years.

*Appeal allowed. Conviction of murder quashed and sentence set aside. Conviction under s. 228 of the Penal Code substituted.*

The appellants in person.

For the respondent:

*KT Fuad* (Solicitor General, Uganda) and *FW Kakembo* and *P Nyamuchoncho* (Crown Counsel, Uganda)  
*The Director of Public Prosecutions*, Uganda

**R v Njogu s/o Wambite**  
**[1963] 1 EA 368 (SCK)**

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|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 3 April 1963                         |
| <b>Case Number:</b>      | 111/1963                             |
| <b>Before:</b>           | Sir John Ainley CJ and Rudd J        |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Criminal law – Possession of housebreaking implements by night – Whether a screwdriver an instrument of housebreaking – Burden of proof – Penal Code (Cap. 63), s. 183 (d) and s. 308 (1) (c) (K.) – Larceny Act, 1916, s. 28.*

**Editor's Summary**

The accused was convicted of being in possession by night without lawful excuse of an instrument of housebreaking, namely, a screwdriver, contrary to s. 308 (1) (c) of the Penal Code. The accused was seen with other two persons entering the compound of a house and later pushing a car out of the compound into the street. The men were disturbed by the arrival of a police car, and all ran away. The accused was caught and a screwdriver and four car ignition keys were found in his possession. A door of the car had been opened by forcing its ventilator window. At the trial the accused gave no lawful excuse for possession of the screwdriver. The magistrate found that the use to which the screwdriver was to be put by the accused was not burglarious but held that, since the screwdriver was capable of being used as an “instrument of housebreaking”, it was as a matter of fact an instrument of housebreaking. In revision

**Held –**

- (i) an article capable of being used for housebreaking albeit designed primarily for innocent purposes, may, if it is in fact capable of being used as a housebreaking implement from its common though not exclusive use for that purpose, be considered to be an instrument or implement of housebreaking without any evidence that the possessor intended to use the article for housebreaking.

*R. v. Patterson*, [1962] 1 All E.R. 340, applied.

- (ii) whether what may be called a dual purpose implement is an instrument of housebreaking is a question of fact and not of law, and the burden of proving that the implement is in fact an instrument of housebreaking rests on the prosecution.
- (iii) if there is no evidence before the court at the close of the prosecution case as to the use to which a dual purpose implement is to be put by the possessor, the court may yet call upon the possessor for his lawful excuse if no excuse is shown by the prosecution evidence, and if it is apparent that, whatever its primary purpose may be, the implement is one commonly used for housebreaking.



- (iv) if no lawful excuse is shown by the accused a conviction may then properly follow, but if on the whole evidence the court is satisfied that there was no intention to use a dual purpose implement for housebreaking it is wrong for the court to hold that the implement is in fact an implement of housebreaking.
- (v) in view of the finding by the magistrate that the use to which the screwdriver was to be put by the accused was not burglarious, the magistrate was wrong in holding that the screwdriver was as a matter of fact an instrument of housebreaking.

Conviction quashed and sentence set aside.

### Case referred to:

- (1) *R. v. Patterson*, [1962] 1 All E.R. 340.

### Judgment

**Sir John Ainley:** Njogu s/o Wambite was convicted in Criminal Case No. 2198 of 1962 by the learned resident magistrate, Nairobi, of an offence contrary to s. 309 (1) (c) of the Penal Code (now s. 308 (1) (c) of that Code) in that he was found having in his possession by night without lawful excuse an instrument of housebreaking, namely a screwdriver.

He was also convicted of an offence contrary to s. 184 (d) of the Penal Code (now s. 183 (d) of that Code), but with that conviction we are not concerned.

The learned judge before whom the record came was doubtful as to the propriety of the first conviction and it was decided to hear the Crown on that question. The case has now been fairly and helpfully argued by Mr. Nagpal for the Crown, and we are in a position to give our decision.

The case can certainly be regarded as an oddity, and it is unlikely that the particular circumstances will occur again.

On the night of November 17/18, 1962, the motor-car of one Mr. Zahoor Ali was standing, locked, within the compound of his house in 4th Street, Eastleigh. During that night police officers saw three men, of whom Njogu was one, enter the compound of the house. A little later the three men were observed to push the car out of the compound into the street. The car could not, of course, have been handled in this manner unless a door had been opened. The three men, including Njogu, were disturbed by the arrival of a police car, and all ran away. Njogu was chased and caught. In his possession was a screwdriver and four car ignition keys. A door of the car was found to be open, and that door had clearly been opened by forcing the ventilator window, or quarter light. Njogu told the police that the screwdriver was “for repairing his motor-car”, while the keys (which did not form the subject matter of the charge) he said were the keys of his house. To the learned magistrate Njogu gave no “lawful excuse” for his possession of the screwdriver, and the learned magistrate said, most reasonably,

“It is clear that the accused’s conduct in relation to P.W. I’s (Zahoor Ali) car very recently before his arrest and the finding of a screwdriver and motor-car ignition keys, his running away on seeing the police patrol car and the fact that the car which the accused and his confederates had pushed on to the road was found to have its ventilator window and a door open, could lead but to one conclusion, that he was there for the purpose of stealing from the motor-car, if not the motor-car itself.”

It is impossible to read that passage without reaching the conclusion that the learned magistrate believed that Njogu had no “lawful excuse” for his possession

of the screwdriver because every known fact in the case pointed dramatically and with certainty to this, that Njogu had the screwdriver in his possession for the purpose of breaking into motor-cars and had, in all probability, used the screwdriver to force the ventilator window of the car in question. The learned magistrate indeed added with a marked show of reason:

“It is, perhaps, pertinent to ask why the accused was not charged with stealing the motor-car”.

However, in spite of a reasonably clear finding that the use to which the screwdriver was to be put, indeed in all common sense had been put, by the accused, was not a burglarious use, the learned magistrate held that since an instrument of the kind and size of the tool in question was capable of being used as an “instrument of housebreaking”, and since the accused could clearly persuade no rational man that a “lawful excuse” for its possession existed, the accused fell squarely under the terms of the section invoked by the prosecution.

Inquiry must first be directed to the question whether a screwdriver can be said to be “an instrument of housebreaking.” Clearly a screwdriver can be used for housebreaking, though ordinarily such a tool is used for lawful purposes. The test proposed in the English case of *R. v. Patterson* (1), [1962] 1 All E.R. 340 when such dual purpose implements are under consideration is whether the implement

“is capable in fact of being used as a housebreaking implement from its common though not exclusive use for that purpose or from the particular circumstances of the case in question”.

The Court of Criminal Appeal in that case was considering a screwdriver and a claw hammer. The deputy-chairman of the trial court had said

“As to what are housebreaking implements the position simply is this: that any implement that can be used for the purpose of housebreaking, whatever its other legitimate use is, is a housebreaking implement.”

The appellate court said that this went too far, but drawing on its judicial knowledge, or common sense, the court held that screwdrivers and claw hammers were commonly used for housebreaking. They further took note of the circumstance that the appellant was in a shop which had been broken into, and had his hand on the till in that shop when he was found in possession of both implements. They held that the appellant was properly convicted of

“being found by night with implements of housebreaking contrary to s. 28 (2) of the Larceny Act, 1916”.

What the court would have held if the appellant in their case had been found in a motor-car which had been broken into, with his hand on the starting switch, we do not know. The court in *Patterson’s* case (1), was at pains to point out that in cases under s. 28 of the English Larceny Act (a section very similar to, though not identical with, s. 308 (1) (c) of our Penal Code) an article capable of being used for breaking houses, albeit designed primarily for innocent purposes, may, subject to the test to which reference has been made, be considered to be an instrument or implement of (and for) housebreaking without any evidence that the possessor intended to use the article for housebreaking.

We accept that such is the law of this country. It is however obvious that the question whether or not what may be called a dual purpose implement is an instrument of housebreaking is a question of fact and not of law, and that the burden of proving that the implement is in fact an instrument of housebreaking rests on the prosecution. If there is no evidence before the court at the close of the prosecution case as to the use to which a dual purpose implement

is to be put by its possessor, the court may yet call upon the possessor for his lawful excuse if no excuse is shown by the prosecution evidence, and it is apparent that the implement is one commonly used for housebreaking whatever its primary purpose may be. If no lawful excuse is shown by the accused a conviction may then properly follow. But if on the whole evidence the court is satisfied that there was no intention to use a dual purpose implement for housebreaking it is surely wrong for the court to hold that the implement is in fact an implement for housebreaking. This does no violence to the decision in *Patterson's* case (1). The court in that case nowhere said that in determining whether an implement is an implement of housebreaking, evidence of intention must be ignored if it is present. Clearly the most satisfactory way of showing that any tool, ordinarily used for innocent purposes, was, in the hands of the accused, a housebreaking tool is to show from the circumstances that the accused intended to use it as such, or had used it as such. *Patterson's* case (1), merely decided that such evidence was not essential to base a conviction, and clearly the court is entitled to hold that an instrument commonly used for housebreaking is an instrument of housebreaking if it is possessed by night without lawful excuse and there is no reliable evidence one way or the other as to intention. Evidence of intention will however always strengthen the contention of the prosecution that the implement is one of housebreaking, and the converse must be true. To our way of thinking there is absurdity in saying that a screwdriver in the hands of a man who clearly has no intention of breaking houses with it, is as a matter of fact an instrument of housebreaking, and for this reason we hold that the conviction cannot stand. In exercise of our powers of revision we quash the conviction for the offence contrary to s. 309 (1) (c) of the Penal Code and set aside the sentence. We leave the Crown to take such further steps as they think fit.

*Conviction quashed and sentence set aside.*

For the Crown:

*OP Nagpal* (Crown Counsel, Kenya)

*The Attorney-General*, Kenya

The accused in person.

### **Municipality of Mombasa v Nyali Ltd** [1963] 1 EA 371 (CAN)

|                        |   |
|------------------------|---|
| <b>Division:</b>       | Court of Appeal at Nairobi                              |
| <b>Date of ruling:</b> | 16 July 1963  |
| <b>Case Number:</b>    | 3/1963 (P.C.)   |
| <b>Before:</b>         | Sir Trevor Gould Ag V-P, Crawshaw Ag V-P and Newbold JA |
| <b>Sourced by:</b>     | LawAfrica   |

(Reference to the full court under s. 5 of the Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, from a decision of a single judge).

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*[1] Practice – Appeal to Privy Council – Limitation – Application for leave to appeal – Application to be made within twenty-one days from judgment – Application not made within twenty-one days but made within sixty days – Application dismissed by a single judge as being out of time – Legislation amended restoring former time limit of sixty days – Reference to full court – Whether amending legislation has retrospective operation – Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, s. 3 and s. 5 – Eastern African (Appeal to Privy Council) Order-in-Council, 1951, s. 4 – Court of Appeal for Eastern Africa (Appeal to Privy Council) Order-in-Council, 1962, s. 1 – Kenya (Constitution) (Amendment) Order-in-Council, 1962 – Kenya (Procedure in Appeals to Privy Council) (Amendment) Order-in-Council, 1963, s. 2 – Eastern African Court of Appeal Rules, 1954, r. 9, r. 19 (6) and r. 88.*

[2] *Statute – Retrospective operation – Amendment of legislation limiting time for appeal – Procedural provision – Whether amendment has retrospective operation – Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, s. 3 – Kenya (Procedure in Appeals to Privy Council) (Amendment) Order-in-Council, 1963, s. 2.*

### Editor's Summary

The applicant's appeal was dismissed by the Court of Appeal on December 21, 1962, when the time prescribed by s. 3 of the Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, for making an application for leave to appeal to the Privy Council was twenty-one days from the date of the judgment. However, prior to December 8, 1962, the time prescribed for such an application was sixty days from the date of the judgment. The applicant applied to a single judge for leave to appeal on February 11, 1963, which was more than twenty-one days but less than sixty days from judgment. At the time when the application came before a single judge the law required that the application should have been made within twenty-one days and accordingly, he dismissed the application as being out of time. On April 2, 1963, the time for making an application for leave to appeal was restored to sixty days by virtue of the Kenya (Procedure in Appeals to the Privy Council) (Amendment) Order-in-Council, 1963. An application for a reference to the full court was made on May 6, 1963, and it was submitted that the provision relating to the time within which the application for leave to appeal should be made is clearly a procedural provision and that where legislation relating to procedural matters is amended, then the new procedural provisions have retrospective effect. The result, it was urged, was that, as the application for leave to appeal had been filed within sixty days from the date of the judgment, the application was properly before the full court and that on the authority of *Attorney-General v. Vernazza*, [1960] A.C. 965, the full court could apply the law existing at the time the reference to the full court was heard by that court.

### Held –

- (i) a provision determining the time within which an appeal must be brought would apply to judgments issued before the commencement of the provision so long as the period specified has not expired by the commencement of the provision, but,
- (ii) in the absence of clear words calling for such a construction in the Kenya (Procedure in Appeals to the Privy Council) (Amendment) Order-in-Council, 1963, requiring the amendment effected by s. 2 thereof to apply to judgments given at any period in the past, the procedural provision therein could not operate retrospectively as such a construction could result in manifest injustice.

Application dismissed.

### Cases referred to in ruling:

- (1) *Attorney-General v. Vernazza*, [1960] A.C. 965; [1960] 3 All E.R. 97.
- (2) *Attorney-General and Newton Abbot R.D.C. v. Dyer*, [1947] 1 Ch. 67; [1946] 2 All E.R. 252.
- (3) *Kerto v. Omach*, [1959] E.A. 31 (C.A.).

July 16. The following rulings were read:

**Ruling**

**Newbold JA:** This reference raises a short, but by no means easy, point as to whether a provision in an Order-in-Council specifying the time in which an application must be made for leave to appeal to the Privy Council has retrospective operation.

The facts are as follows. On December 21, 1962, judgment was given by this court in an appeal by the applicant dismissing the appeal. On February 9, 1963, notice was given by the applicant to the respondent of intention to apply for leave to appeal to the Privy Council and on February 11, 1963, the applicant filed a motion applying for conditional leave to appeal to the Privy Council as of right against the judgment above referred to. This motion came before a single judge of this court' on March 25, 1963, and was dismissed on the ground that the application had not been filed within twenty-one days of the judgment sought to be appealed against. On May 6, 1963, the applicant applied for his application to be placed before a full court of three judges in accordance with the proviso to s. 5 of the Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962.

Historically, the relevant Orders-in-Council relating to appeals to the Privy Council against decisions of this court are as follows:

1. Up to December 8, 1962, the circumstances in which an appeal to the Privy Council would lie from a decision of this court, and the procedure relating thereto, were set out in the Eastern African (Appeal to Privy Council) Order-in-Council, 1951 (S.I. No. 609 of 1951), and under s. 4 of that Order-in-Council applications to this court for leave to appeal were required to be made within sixty days from the date of the judgment to be appealed from. This Order-in-Council was revoked with effect from December 9, 1962, by s. 1 of the Court of Appeal for Eastern Africa (Appeal to Privy Council) Order-in-Council, 1962 (S.I. No. 2601 of 1962).
2. As from December 9, 1962 the circumstances in which a right of appeal to the Privy Council lies against a decision of this court given in respect of a Kenya suit are set out in the Kenya (Constitution) (Amendment) Order-in-Council, 1962 (S.I. No. 2599 of 1962). As from the same date the procedure relating to any such appeal is set out in the Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962 (S.I. No. 2600 of 1962), s. 3 of which states that applications to the court for leave to appeal shall be made within twenty-one days of the date of the judgment to be appealed from.
3. By s. 2 of the Kenya (Procedure in Appeals to Privy Council) (Amendment) Order-in-Council, 1963 (S.I. No. 612 of 1963), which came into operation on April 2, 1963, s. 3 of the principal Order-in-Council was amended so as to substitute sixty days for the twenty-one days referred to therein, with the result that the time within which an application for leave to appeal to the Privy Council against a decision of this court had to be made was restored to sixty days, the period it had been prior to December 9, 1962.

It will be seen from the facts set out above that on December 21, 1962, when the judgment against which an appeal is sought to be entered was given, the time within which the application for leave to appeal had to be made was twenty-one days. In fact the application was not made until February 11, 1963, which was more than twenty-one days but less than sixty days. At the time that the application came before a single judge of this court the law required that the application should have been made within twenty-one days and, accordingly, he dismissed the application as being out of time. An application for a reference to the full court was made on May 6, 1963, and between March 25, 1963, the date when the single judge refused the application, and May 6, 1963, when a request for a reference to the full court was made, the Kenya (Procedure in Appeals to the Privy Council) (Amendment) Order-in-Council, 1963, which came into operation on April 2, 1963, had restored the period within which application for leave to appeal should be made to sixty days.

Mr. O'Donovan, in an attractive argument, has submitted that the provision relating to the time within which the application for leave to appeal should



be made is clearly a procedural provision and that where legislation relating to procedural matters is amended then the new procedural provisions have retrospective effect. The result, he urges, is that as the application for leave to appeal in this matter had been filed within sixty days of the date of the decision against which leave to appeal is sought, the application is properly before the full court. He concedes that when the application came before the single judge that judge had no alternative but to dismiss it; but on the authority of *Attorney-General v. Vernazza* (1), [1960] A.C. 965, he urges that the full court can apply the law existing at the time the reference to the full court is heard by that court.

Before I deal with the issue raised on this reference I think I should dispose of a subsidiary matter which has not been raised. The jurisdiction of a single judge to deal with the application is given by s. 5 (a) of the Kenya (Procedure in Appeals to Privy Council) Order-in-Council, 1962, and the proviso to the section states that any decision of a single judge “may be varied, discharged or reversed by the court when consisting of three judges”. It would seem that under r. 19 (6) of the Eastern African Court of Appeal Rules, 1954, as amended and as applied by r. 88, the application to have the matter referred to the full court for a decision should have been made within seven days of the decision of the single judge. In fact it was not made until about one and one half months after the decision and it was during that period that the law was changed. No point has, however, been made of this delay and, so as to enable the substantive issue raised on this reference to be dealt with, I would under r. 9 of the Rules of this court extend the time for applying for the reference to May 6, 1963, so as to enable this court to consider the application for leave to appeal.

I should also like here to refer to another matter which, though touched on, was not the subject of substantial argument: that is, the question whether on a reference to the full court from a single judge the full court can have regard to facts which were not before the single judge and to legislation which has come into operation since the decision of the single judge. For the purposes of this reference I shall assume that it can, but I make that assumption only on the clear reservation that such would not necessarily be my conclusion if it were necessary for me to arrive at a decision on the matter.

Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, *prima facie* it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.

It has been argued by Mr. Harris that the provision in question affects substantive rights and is not procedural. I cannot accept that submission, as it appears to me that the time within which an application to enforce a right must be filed deals with the remedy for enforcing the right and not with the right itself. This being so the provision is procedural, though I appreciate that a procedural provision may have the result, as is urged is the result in this case, of recreating a substantive right which would otherwise be lost.

Accepting that the provision relating to time is procedural and would thus *prima facie* have retrospective operation, the question still remains whether the intention behind the amendment restoring the time limit to sixty days was that it should apply in respect of a judgment which was given more than sixty days before the commencement of the amending provision.

Retrospective operation may be of two characters. In the one, regard is had to events antecedent to the commencement of the legislation in order to determine the position at a time subsequent to such commencement; in the other, regard is had to such events in order to determine the position prior to such commencement. In my view while the courts would construe a procedural provision as *prima facie* retrospective in the first of such characters, it would require a clear intention to that effect before such a provision would be construed to be retrospective in the second of such characters.

I would accept that a provision determining the time within which an appeal must be brought would apply to judgments issued before the commencement of the provision so long as the period specified had not expired by the commencement of the provision. In other words I consider that the amendment effected on April 2, 1963, would apply in respect of judgments given less than sixty days before that date even if no application had been made within the previously required period of twenty-one days. I cannot, however, accept that it applies to judgments given at any period in the past, as such a construction could result in manifest injustice; and in the absence of clear words requiring such a construction I am not prepared to impute an intention that a procedural provision setting out the time within which an act must be done should operate retrospectively to such an extent that it could result in manifest injustice. The extent of the retrospective operation of the provision would be the same whether it increased or reduced the time limit. If instead of increasing the time limit it had reduced it, could it possibly be argued that if the application had been made within the previous time limit nevertheless it was bad because it had not been made within the new time limit.

It is urged that the cases of *Attorney-General and Newton Abbot Rural District Council v. Dyer* (2), [1947] 1 Ch. 67 and *Attorney-General v. Vernazza* (1), are authorities for giving a procedural provision relating to time an unlimited retrospective operation and for enabling this court to apply the law as it now exists. As regards the *Dyer* case (2), Evershed, J. (as he then was), held on the construction of the particular statute before him that the statute applied to periods the terminal dates of which had occurred before the commencement of the statute. As the learned judge pointed out at pp. 89 and 90, he arrived at this construction because any other would result in the whole of a sub-section being “otiose or at best declaratory only” and he did not think that he should give to a whole sub-section of a short Act so negative an effect unless he was compelled to do so. As I have already pointed out, each legislative provision must be construed so as to give effect to the intention manifested by it, but the intention manifested by one legislative provision is not necessarily the same as that manifested by another. I do not, therefore, regard *Dyer’s* case (2), as authority for saying that the amendment of April 2, 1963, applies to periods which had terminated before that date.

As regards *Vernazza’s* case (1), it was pointed out by all the law lords that it was not truly a question of retrospective operation. As Viscount Simonds, L.C., said at p. 975:

“I would respectfully doubt whether this could in any view be strictly called retrospective legislation, but, if it has this characteristic in any degree, it is of a procedural nature . . .”

I cannot see how this case can be said to be an authority for construing the particular provision before this court in such a way as to give it unlimited retrospective operation. *Vernazza’s* case (1), is also used as authority for saying that this court should apply the law in existence at the time it considers the matter. As I understand the decision in that case, it went only to this: that as the High Court could have made an order if application had been made to it at the time

when the appeal was heard, therefore the Court of Appeal could, in the exercise of its powers, itself make the order and could do so by varying the original order of the High Court. Applying the principle of that decision to this reference at most it means that this court could and should apply the provisions of the amendment effected on April 2, 1963. But I have already come to the conclusion that those provisions do not operate in an unlimited retrospective effect, that is, they do not apply to judgments given sixty days or more before that date. The result is that even if regard is had to the amendment it is of no avail to the applicant.

I would accordingly dismiss the application with costs and confirm the order of the single judge.

**Sir Trevor Gould Ag P:** I agree. For completeness I would add that the decisions of this court, of which *Kerto v. Omach* (3), [1959] E.A. 31 (C.A.), is an example, in which it has been held that this court has no power to extend the time within which an application for conditional leave to appeal to the Privy Council may be made, were not called in question in argument on this application.

The application is dismissed with costs.

**Crawshaw Ag V-P:** Without considering whether on other grounds it would be wrong to give retrospective effect to s. 2 of the Kenya (Procedure in Appeals to Privy Council) (Amendment) Order-in-Council, 1963, I agree with Newbold, J.A., that looking at the section from the point of view of procedure alone, it still could not bring the applicant within time for the reasons given by the learned Justice of Appeal.

*Application dismissed.*

For the applicant:

*Bryan O'Donovan QC and DS Obhrai*  
*DS Obhrai, Mombasa*

For the respondent:

*Gerald Harris*  
*Hamilton, Harrison & Mathews, Nairobi*

**Isa Mukabya v R**  
**[1963] 1 EA 376 (CAK)**

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|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Kampala                                    |
| <b>Date of judgment:</b> | 11 May 1963   |
| <b>Case Number:</b>      | 185/1962  |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | High Court of Uganda – Keatinge, J                            |

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*[1] Criminal law – Murder – Causing death while resisting lawful arrest – Whether malice aforethought implied – Misdirection – Definition of “grievous harm” – Penal Code, s. 189 and s. 190 (K.) – Penal Code, s.4, s. 186 and s. 209 (2) (U.).*

### **Editor’s Summary**

The appellant was charged with the murder of a location chief while resisting lawful arrest and the judge, relying upon *R. v. Karioki wa Njagga* (1934), 1 E.A.C.A. 149, directed himself and the assessors that, if the appellant caused the death of the deceased while resisting lawful arrest, malice aforethought was to be implied. The judge found that the appellant caused the death of the deceased while resisting lawful arrest and accordingly convicted him of murder. On appeal.

### **Held –**

- (i) an intent to resist arrest or even to use violent measures to resist arrest does not per se constitute malice aforethought with the definition thereof in either the Uganda or Kenya Penal Code.

- (ii) s. 186 of the Penal Code of Uganda is comprehensive and exhaustive and, if the circumstances do not fall within one or other paragraphs of the section, malice aforethought has not been established.
- (iii) if the judge had considered whether any other type of malice aforethought was established he would have come to the conclusion that the appellant as a reasonable man knew that, by stabbing the deceased as he did, he would probably cause harm which was likely seriously to injure the health of the deceased; accordingly malice aforethought within the meaning of para. (b) of s. 186 of the Penal Code was established.
- (iv) harm which is likely seriously to injure health is grievous harm within the meaning of the definition of “grievous harm” in s. 4 of the Penal Code.

Appeal dismissed.

#### **Cases referred to in judgment:**

- (1) *R. v. Karioki wa Njagga* (1934), 1 E.A.C.A. 149.
- (2) *R. v. Porter*, 12 Cox C.C. 444.

#### **Judgment**

**Sir Ronald Sinclair P:** read the following judgment of the court: This is an appeal from a conviction for murder by the High Court of Uganda. The case for the prosecution was that the appellant caused the death of the deceased, a Muluka or location chief, by stabbing him with a knife while resisting lawful arrest. The appellant’s defence was that he was set upon and severely assaulted by the deceased and three or four other chiefs and that he killed the deceased, whom he did not know to be a chief, in self-defence.

Evidence was adduced by the prosecution that during the night of March 25, 1962, the appellant went to the house of one Bumba and wounded him severely on a finger with a panga. Next morning Bumba complained to the chiefs and, through the usual channels, the complaint eventually reached Gombolola or Sub-County Chief Samusoni. Chief Samusoni personally instructed the deceased to arrest the appellant and bring him to Gombolola headquarters. The learned judge did not make any finding as to whether or not Bumba’s complaint was true, but he accepted Chief Samusoni’s evidence that he gave such instructions to the deceased. It was not in dispute that in accordance with those instructions the deceased had authority to arrest the appellant.

On March 26, a party of chiefs set out to instruct their people to dig up and burn cotton plants and also to arrest the appellant. The party consisted of the deceased, who was the senior chief, two Mutongole or assistant location chiefs, Ahemeda and Keresoni, clan chief Yakobo and possibly one other. At about 2.30 p.m. when they were standing at the side of the main Mbale-Soroti road, a motor cycle driven by Edirisa and on which the appellant was a passenger came along. Ahemeda signalled to the driver to stop which he did. Those facts are not in dispute, but there is a conflict of evidence as to what happened thereafter.

Ahemeda, Keresoni and Edirisa gave evidence for the prosecution. The judge found that Ahemeda had lied in part of his evidence and took the view that he could attach little or no weight to it. As to Keresoni he said that he was rather vague and that he very fairly admitted that at the time of the stabbing

he was not really paying much attention. However, he found Edirisa to be a straight-forward and convincing witness and was satisfied that the appellant stabbed the deceased in the circumstances related by him. Edirisa testified that after he had stopped his motor cycle Ahemeda, pointing to the appellant, said to the deceased "This is the man you are looking for." The deceased then asked

him to assist him, the deceased, by taking the appellant and Chief Keresoni to Gombolola headquarters. As he was about to start his motor cycle, the appellant jumped off and ran to the side of the road. The appellant said to the deceased that he had not seen a letter or warrant authorising him to send him to Gombolola headquarters. The deceased then ordered the other chiefs to catch and arrest the appellant. At that time the deceased threw down his bicycle and stick and rushed at the appellant. As the deceased was about to “grab” the appellant, the appellant drew a knife from his waist and stabbed the deceased on his left arm. They both fell to the ground, the appellant on his back with the deceased on top of him. Before falling the appellant stabbed the deceased once on his side. Chief Keresoni came to the deceased’s assistance and as he tried to take the knife from the appellant he, Keresoni, was cut on the finger. One of the other persons who came to the deceased’s assistance struck the appellant on his wrist and forced him to let go the knife. The appellant was then arrested and tied up.

The medical evidence showed that the deceased received a deep cut on the outside of his left arm just above the elbow, a deep skin cut on the back of the same arm, a deep cut on the left side of the chest at the back and two very small cuts on the back. The first wound described above cut the main blood vessel in the arm and the cause of death was shock and haemorrhage from that injury.

The appellant who gave evidence on oath told a very different story. He said that when Ahemeda signalled them to stop he saw five people on the side of the road of whom he knew four, Ahemeda, Keresoni, Yakobo and one Kubito who was not mentioned by the prosecution witnesses. The fifth person was the deceased whom he had not previously known. Ahemeda asked him to produce the bicycle which he had stolen the previous night. He replied that Ahemeda had not mentioned the bicycle to him when they had met that night. Before Ahemeda could reply the deceased rushed at him with a stick saying that he was an habitual thief. The deceased struck him with a stick. He ran across the road but both Ahemeda and the deceased assaulted him with sticks. The deceased then clasped him and the other chiefs all started to beat him. He tried to escape by retreating into the bush, but the deceased threw him to the ground, the deceased falling on top of him. The deceased then drew a knife and threatened to stab him, but he snatched the knife from the deceased and said he would stab the deceased if he was not released. The other chiefs who were still beating him said “Let us beat him.” In order to free himself he stabbed the deceased’s left arm and was then freed. The appellant called no witnesses.

After the appellant was arrested he was medically examined. He was found to have six injuries, a fracture of a bone in his left hand, a swelling of the other hand, scratches on his left shoulder and right leg and a swelling and a small lacerated wound on the left leg. On behalf of the appellant it was submitted that those injuries afforded corroboration of his story that he killed the deceased when defending himself from a sudden attack by the deceased and the other chiefs and that on the evidence there was a reasonable doubt as to his guilt.

The learned judge, however, had no doubt that the appellant’s story was untrue and it is evident that the assessors formed the same opinion. As to how the appellant received his injuries the judge referred to the evidence of the prosecution witnesses that he was struck on his hand to make him release the knife and that he was beaten after he was tied up. We can find no reason for taking a different view as to the credibility of the witnesses.

From the evidence which the learned judge accepted it is therefore clear that the deceased had authority to arrest the appellant, that he was fatally wounded by the appellant when he attempted to arrest him and that he was first stabbed by the appellant before he had touched the appellant. In view of the fact that when the appellant was informed that he was to be taken to Gombolola headquarters

he jumped off the motor cycle and ran to the side of the road, we think the deceased had good grounds for apprehending that the appellant would not submit to arrest. In those circumstances we agree with the learned judge that the deceased was justified in rushing at the appellant in the way he did. The deceased dropped his stick before he did so and was unarmed when he attempted to seize the appellant. Once the appellant had drawn a knife and wounded the deceased considerable force was then justified to disarm and arrest him. In our view the force which was used was not excessive in the circumstances. The appellant must have known the reason for his arrest, for Chief Keresoni testified that the deceased informed the appellant that he had received a report that he had cut someone's finger.

The other main ground of appeal which was argued was that the appellant did not know the deceased was a Muluka Chief and so did not know the deceased was authorised to arrest him. It is true that the learned judge did not make any express finding on this aspect of the case, but we think it is implicit in his judgment that he must have been satisfied that the appellant had such knowledge. It appears that both the assessors came to the same conclusion. The first assessor said "He (the appellant) refused to go to the Gombolola headquarters when he knew it was the chiefs who were ordering him.", and the second assessor said "The presence of the other chiefs at the time refutes accused's allegation that the arrest was unlawful." Moreover, on the evidence we do not think that the learned judge could reasonably have come to any other conclusion. The appellant admitted that he knew at least some of the party to be chiefs and in his evidence he referred to "the rest of the chiefs" and "the other chiefs". He must have heard the deceased order the other chiefs to arrest him and must have realised that the deceased was some kind of a chief who had authority over the other chiefs.

We come now to a question which, although it was not raised as a ground of appeal, has caused us most concern. That is the question of malice aforethought. The learned judge directed himself and the assessors that if the appellant caused the death of the deceased while resisting lawful arrest malice aforethought was to be implied. Having found that the appellant did cause the death of the deceased while resisting lawful arrest, he accordingly convicted the appellant of murder. In so directing himself and the assessors he relied on the decision of this court in *R. v. Kariuki wa Njagga* (1) (1934), 1 E.A.C.A. 149. That was an appeal from the Supreme Court of Kenya and it was held following *R. v. Porter* (2), 12 Cox C.C. 444, that violence inflicted in resisting arrest lawfully made implies malice aforethought and therefore death resulting justifies a charge of murder. No reference was made in the judgment in that case to s. 189 of the Kenya Penal Code which at that time read:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- (a) an intention to cause the death of or to do grievous harm to any person whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."



The equivalent section in the present Kenya Penal Code is in the same terms. At the time *Karioki's* case (1), was decided the Uganda Penal Code contained the same provision, but in 1957 para. (c) was amended to read:

“(c) using violent measures in the commission of a felony.”

The section in question is now s. 186.

Until the enactment of the Homicide Act, 1957, it was undoubtedly the law in England that if a man killed an officer of justice when he was acting in the execution of his duty malice was implied and the offence was murder. That was an historical relic from the ancient period of strict liability when it was not necessary to establish any specific mental attitude on the part of the accused person and any killing in the course of the commission of any unlawful act was murder. In our view it is clear that an intent to resist arrest or even using violent measures to resist arrest does not per se constitute malice aforethought within the meaning of the section in either of the Kenya or Uganda Penal Codes relating to malice aforethought. But, at the time when *Karioki's* case (1), was decided s. 190 of the Kenya Penal Code provided:

“Any person who is shown to have caused the death of another is presumed to have wilfully murdered him unless the circumstances are such as to raise a contrary presumption.

“The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shown to have caused the death of another.”

The Uganda Penal Code then contained the same provision, but both sections were repealed a few years later. It may be that in deciding *Karioki's* case (1), the court had that very wide provision in mind or it may be that the decision was per incuriam for no reference was made to the section in the Penal Code relating to malice aforethought. Be that as it may, we do not think that the decision in *Karioki's* case (1), is applicable as the law stands at present. In our view s. 186 of the Uganda Penal Code is comprehensive and exhaustive and, if the circumstances do not fall within one or other of the paragraphs of the section, malice aforethought has not been established.

Counsel for the Crown submitted, however, that the appellant was shown by the evidence to have intended to do grievous harm to the deceased or at the least must have had knowledge that his act would probably cause grievous harm to the deceased, within the meaning of para. (a) or para. (b) of s. 186 of the Penal Code. “Grievous harm” is defined in s. 4 of the Penal Code as meaning:

“any harm which amounts to a main or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.”

In view of the learned judge's decision that malice aforethought was implied because the appellant caused the death of the deceased while resisting lawful arrest, he did not find it necessary to consider whether any other type of malice aforethought was established. We are satisfied, however, that had he done so, he must in reason have come to the conclusion that the appellant had knowledge as a reasonable man that by stabbing the deceased in the way he did he would probably cause harm which was likely seriously to injure the health of the deceased. Harm which is likely seriously to injure health is grievous harm within the meaning of the definition. A man who uses a knife in the way the appellant did must know that from one or other of the stabs or from their totality really serious injury is a probable consequence. For those reasons we think that malice aforethought within the meaning of paragraph (b) of s. 186 was established.

It is therefore unnecessary to consider the alternative argument that the appellant used violent measures to commit a felony, namely an offence contrary to s. 209 (2) of the Penal Code, within the meaning of para. (c) of s. 186.

The appeal is, accordingly, dismissed.

*Appeal dismissed.*

For the appellant:

*JWR Kazzora*

*JWR Kazzora*, Kampala

For the respondent:

*AK Korde* (Crown Counsel, Uganda)

*The Director of Public Prosecutions*, Uganda

**Olinda De Souza Figueiredo v Kassamali Nanji**  
[1963] 1 EA 381 (CAK)

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|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Kampala                            |
| <b>Date of judgment:</b> | 6 July 1963   |
| <b>Case Number:</b>      | 13/1963   |
| <b>Before:</b>           | Sir Trevor Gould Ag P, Crawshaw Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | High Court of Uganda – Sheridan, J                    |

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*[1] Mortgage – Mortgage not signed by mortgagee – No positive covenants by mortgagee – Mortgage registered – Validity of mortgage – Whether absence of mortgagee’s signature a matter of substance – Registration of Titles Ordinance (Cap. 123), s.114, s. 156 and s. 209 (1) (U.).*

**Editor’s Summary**

The appellant, who owned certain land, mortgaged it to the respondent. The mortgage deed was signed by the appellant but not by the respondent and subsequently was duly registered. The appellant later sued for a declaration that the mortgage was void for want of the mortgagee’s signature and relied on s. 156 of the Registration of Titles Ordinance. The judge held that the mortgage instrument was valid, that it had properly been registered, that the absence of the mortgagee’s signature was not a matter of substance, and that in any event the court would not, in the absence of fraud, go behind the fact of registration and accordingly dismissed the suit. On appeal it was argued that before an effective legal mortgage of land registered under the Ordinance could come into existence the mortgage instrument must be signed by

both the mortgagor and mortgagee, that the signature of the mortgagee is a matter of substance and that this cannot be disregarded under s. 209 (1) of the Ordinance. The form of mortgage set out in the Eleventh Schedule to the Ordinance provided a place for the signatures of mortgagor and mortgagee and it was submitted that the requirements of the form are mandatory.

**Held –**

- (i) the mere fact that a form provides for the signature of a party does not make it mandatory that such party shall sign in order to give the instrument legal efficacy; thus when the signature is not, apart from the form, necessary the requirement of the form does not make the signature a matter of substance.
- (ii) s. 156 of the Registration of Titles Ordinance deals purely with a minor procedural matter and merely requires that where there is a signature on an instrument the signature must either be in Latin character or certain other things must be done; it does not set out what signatures are required to an instrument.

- (iii) there is nothing in s. 156 of the Ordinance which requires a mortgagee to sign the mortgage instrument in order to make the instrument effective and there is nothing in the Ordinance which requires the mortgage instrument to be signed by both the mortgagor and mortgagee before it can properly be registered.

Appeal dismissed.

### Cases referred to in judgment:

- (1) *Wing v. Epson Urban Council*, [1904] 1 K.B. 798.
- (2) *Inland Revenue Commissioners v. Hinchy*, [1960] 1 All E.R. 505.
- (3) *Govindji Popatlal v. Nathoo Visandji*, [1962] E.A. 372 (P.C.).

The following judgments were read:

### Judgment

**Newbold JA:** On June 24, 1959, the appellant (hereinafter called the “mortgagor”), who was the registered proprietrix of certain land, signed a mortgage of the said land in favour of the respondent (hereinafter called the “mortgagee”) in consideration of a loan of Shs. 70,000/-. The mortgage instrument was in the form set out in the Eleventh Schedule to the Registration of Titles Ordinance (Cap. 123 of the Laws of Uganda and hereinafter referred to as the “Ordinance”), save that the instrument was signed only by the mortgagor. On July 2, 1959, the registrar made an entry on the certificate of title to the land that the land was mortgaged to the mortgagee. In a plaint dated April 18, 1962, the mortgagor claimed, *inter alia*, a declaration that the mortgage instrument was wholly void and she also asked for the register at the Registry of Titles to be rectified so as to show the title of the land free of any incumbrance. On June 29, 1962, following a sale by the mortgagee, the purchaser of the land was registered as the proprietor of the land in place of the mortgagor. On August 24, 1962, a defence was filed in which, as amended, there was an assertion that the mortgagee was a duly registered legal mortgagee and, in the alternative, there was a prayer for a declaration that the mortgagee was an equitable mortgagee. On the case coming before the High Court, by consent the certificate of title and counterpart of the mortgage instrument were put in as exhibits. It was agreed that no evidence need be called and that the case should be decided on the evidence provided by the exhibits. The learned judge held that the mortgage instrument was valid, that it had properly been registered, and that in any event the court would not, in the absence of fraud, go behind the fact of registration and, accordingly, he dismissed the suit. From this decision the mortgagor appealed and the mortgagee cross-appealed.

Section 114 of the Ordinance empowers a proprietor to mortgage his land “by signing a mortgage thereof in the form in the Eleventh Schedule”. The form set out in the Eleventh Schedule, so far as is relevant, starts:

“I (then appears the mortgagor’s name) being the registered proprietor . . . in consideration of the sum of . . . this day lent to me by (then appears the mortgagee’s name) do hereby covenant with the said mortgagee.”

Then follow the covenants and the form ends –

“ . . . for better securing the payment in manner aforesaid of the said principal sum and interest I hereby mortgage to the said mortgagee all my estate and interest in the said land”.

At the bottom of the form there is a place reserved for the signatures of the mortgagor and mortgagee. Section 156 of the Ordinance, so far as it is relevant, provides that –

“No instrument or power of attorney shall be duly executed unless either (a) the signature of each party thereto is in Latin character, or . . .”

Under s. 209 (1) of the Ordinance variations from the forms “in any respect not being matter of substance shall not affect their validity” and the judge held that the absence of the mortgagee’s signature in this particular mortgage was not a matter of substance. As regards s. 156, the judge held that he would read the words “any party” as meaning “any necessary party” and that as this mortgage did not contain any positive covenant by the mortgagee he was not a necessary party.

The two main issues which arise on the appeal are, first, does the Ordinance require a mortgage instrument to be signed by both the mortgagor and mortgagee before it can properly be registered; and, secondly, does the court have power to go behind the register and declare that an entry of a mortgage should be cancelled on the ground that the mortgage instrument was signed only by the mortgagor. It is only if the answers to both those issues are in the affirmative that secondary issues, such as the relationship of the mortgagor and mortgagee if the mortgage instrument is ineffective as a legal mortgage, arise.

The mortgagor submits that before an effective legal mortgage of land registered under the Ordinance can come into existence the mortgage instrument must be signed by both the mortgagor and mortgagee. It is urged that the signature of a mortgagee to any mortgage is a matter of substance and that this can not be disregarded under s. 209 (1); that the requirements of the form are mandatory, as is shown by *Wing v. Epsom Urban Council* (1), [1904] 1 K.B. 798; that the literal interpretation of s. 156 clearly requires every party to the instrument to sign it and that the insertion of the word “necessary” is, in the words of Viscount Kilmuir, L.C., in *Inland Revenue Commissioners v. Hinchy* (2), [1960] 1 All E.R. 505 at p. 508, “legislation and not construction”.

Apart from the provisions of the Ordinance to which I have referred, there is nothing in this mortgage which makes the signature of the mortgagee essential. In my view, the mere fact that a form has provision for the signature of a party does not make it mandatory that such party shall sign in order to give the instrument legal efficacy. Thus when the signature is not, apart from the form, necessary the requirement of the form does not make the signature a matter of substance. In *Wing’s* case (1) the form in question was an order of a court, which order had to be made by two justices and, according to the form, signed by two justices. The court held that on the construction of the relevant statute the order had to be both made and signed by two justices. As Wills, J., said at p. 803: “It is not a mere form. It is part of the order.” There would appear to have been no provision similar to s. 209 (1) and in any event I consider a decision on the formality and precision needed for an order of a court not necessarily applicable to the form of a mortgage. It is to be noted that s. 114 refers only to the signature of the mortgagor and it is only incidentally, by the reference to the form, that any question of the signature of the mortgagee arises.

It is, however, on s. 156 that the mortgagor chiefly relies. It is submitted that this section does two things: first, it requires each party to an instrument to sign it and secondly it requires each such signature to be in the Latin character. A mortgagee is clearly a party to the mortgage instrument and it is submitted that unless the mortgagee signs there has been no compliance with the section and the instrument is thus ineffective. It would appear that the judge accepted that the section required each party to an instrument to sign it and thus found it necessary to insert a word in order to avoid a construction which would require the signature of the mortgagee, and it is to such insertion that the mortgagee objects. With respect to the learned judge I see nothing in s. 156 which requires each party to an instrument to sign it; indeed, if it is to have

that effect it would, in my view, require the insertion after the word “unless” of words such as “it is signed by each party and”. This section is dealing purely with a minor procedural matter in a Part headed “Powers of Attorney and Attestation of Instruments”. The section merely requires that where there is a signature on an instrument the signature must either be in Latin character or certain other things must be done; it does not set out what signatures are required to an instrument. In my opinion there is nothing in s. 156 which requires a mortgagee to sign the mortgage instrument in order to make the instrument effective. It is possible that a donee of powers under a power of attorney may be regarded as a party to the instrument and if this is so I would point out that if the mortgagor’s submissions were correct it would have the somewhat startling result that such donee would have to sign the instrument before it became effective.

I am satisfied that there is nothing in the Ordinance which requires a mortgage instrument to be signed by both the mortgagor and the mortgagee before it can properly be registered. It is thus unnecessary to consider the second main issue, though on this issue I think I should refer to the endorsement by the Privy Council in *Govindji Popatlal v. Nathoo Visandji* (3), [1962] E.A. 372 (P.C.) at p. 376, of a statement of this court on the sanctity of the register.

For these reasons I would dismiss the appeal with costs. As the first part of the cross-appeal was not a true cross-appeal and as the mortgagee was unable to set out clearly the precise relief he desired on the second part of the cross-appeal I would make no order for costs on the cross-appeal but would regard the entire hearing time as related to the appeal.

**Sir Trevor Gould Ag P:** I have had the advantage of reading the judgment of the learned Justice of Appeal and agree with his reasoning and conclusions.

The appeal is dismissed with the orders as to costs suggested by the learned Justice of Appeal.

**Crawshaw Ag V-P:** I do not personally read the judgment of the learned trial judge as accepting that s. 156 of the Ordinance required each party to an instrument to sign it, but I agree with the conclusions of Newbold, J.A., and the order proposed by him.

*Appeal dismissed.*

For the appellant:

*DN Khanna and JS Shah*

*JS Shah, Kampala*

For the respondent:

*MV Jobanputra*

*Jobunputra & Pandya, Kampala*

**Warehousing & Forwarding Co of East Africa  
Ltd v Jafferli & Sons Ltd  
[1963] 1 EA 385 (PC)**

**Division:** Privy Council

**Date of judgment:** 30 July 1963  
**Case Number:** 6/1962  
**Before:** Viscount Radcliffe, Lord Morris of Borth-y-Gest, Lord Guest,  
Lord Pearce and Sir Kenneth Gresson  
**Sourced by:** LawAfrica  
**Appeal from:** E.A.C.A. Civil Appeal No. 66 of 1960 on appeal from H.M.  
Supreme Court of Kenya – Farrell, J

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*[1] Agent – Contract – Ratification – Negotiations for lease by agent – Stipulation that ratification of principal required – Possession of premises given before duration of lease agreed – Draft lease for three years submitted to lessees – Counter proposal for different period by lessees – Subsequent ratification by principal of three years’ term – Ratification not communicated to lessors – Whether contract concluded.*

*[2] Practice – Appeal – New point taken on appeal – Inconsistent with case at trial – Surprise – Discretion of appellate court to allow point to be argued – Evidence on point taken inconclusive – Whether appellate court should allow new point to be taken.*

### **Editor’s Summary**

In December, 1957, there were negotiations between the appellants, acting through one, *E.*, and the respondents whereby the appellants were to lease certain premises from the respondents. *E.* had informed the respondents that the appellants’ offer to take the lease was subject to the approval of the appellants’ general manager. On January 1, 1958, the appellants took possession and negotiations continued about the term of the lease. On January 25 the respondents wrote to the appellants stating *inter alia* that “it is now agreed that you are renting the godown for a lease of three years from January 1, 1958”. On February 3 the appellants replied “We are in receipt of your letter of the 25th instant and are disappointed that you appear unable to accede to our request for one year’s lease with our option for extending for a further two years. May we ask to kindly give this matter further consideration”. Subsequently the general manager of the appellants confirmed that a three years’ lease would be acceptable but there was no evidence that the respondents were so informed. Ultimately the appellants after notice to the respondents vacated the premises on June 30, 1958, and the respondents filed an action claiming damages for breach of the agreement to lease the godown. It was pleaded that agreement had been reached “in or about January, 1958”, and, in opening, counsel for, the respondents made it clear that his clients’ case was that an oral agreement for a lease of the premises was reached at the end of December, 1957, maintaining that this came within the pleading “in or about January, 1958”. *E.*’s evidence was that no concluded agreement was made in December, 1957, as to the terms of the lease and that when on February 17 he received copies of the draft lease he had received confirmation from his general manager for a three years’ lease. The trial judge dismissed the claim holding that no binding agreement had ever been concluded between the parties; that the evidence of discussions between the parties in December, 1957, was inconclusive and that the parties were never *ad idem*. On appeal to the Court of Appeal the respondents abandoned their case that a verbal agreement had been concluded in December, 1957, and maintained that, upon the evidence, an agreement had been concluded at latest in February, 1958. The Court of Appeal concluded that it was open to the appellants to raise this new point and held that a concluded agreement had been reached before February 17, 1958. On a further appeal



**Held –**

- (i) where the agent for one party to a negotiation informs the other party that he cannot enter into a contract binding his principal except subject to his approval, there is in truth no contract or contractual relation until the approval has been obtained; further an acceptance by an agent subject in express terms to ratification by his principal is legally a nullity until ratification, and is no more binding on the other party than an unaccepted offer, which can be withdrawn before acceptance.
- (ii) the evidence did not establish whether *E.* was negotiating subject to the approval of the general manager or had contracted subject to the general manager's ratification; if *E.* contracted subject to ratification by his principal, there would be no contract until ratification had been obtained; where, however, the other party has intimation of the limitation of the agent's authority neither party can be bound until ratification has been intimated to the other party.
- (iii) there was no evidence that the ratification by the general manager came before February 3 and accordingly withdrawal by the appellants was effectively made and communicated to the respondents by their letter of February 3.
- (iv) since the evidence was not clear upon material points, the respondents ought not to have been allowed to argue the new point before the Court of Appeal.

Appeal allowed. Judgment of the Supreme Court of Kenya restored.

**Cases referred to in judgment:**

- (1) *Watson v. Davies*, [1931] 1 Ch. 455.
- (2) *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295.
- (3) *Fleming v. Bank of New Zealand*, [1900] A.C. 577.
- (4) *Koenigsblatt v. Sweet*, [1923] 2 Ch. 314.
- (5) *Connecticut Fire Insurance Company v. Kavanagh*, [1892] A.C. 473.

**Judgment**

**Lord Guest:** This is an appeal from a decision of the Court of Appeal for Eastern Africa reversing a decision of the Supreme Court of Kenya (Farrell, J.), whereby he dismissed the respondent's claim against the appellants for a sum of Shs. 51,350/- damages for breach of an alleged agreement for the grant by the respondents to the appellants of a godown in Clarke Lane, Nairobi. The Court of Appeal entered judgment for Shs. 51,350/-.

The appellants are a wholly owned subsidiary of Leslie & Anderson (East Africa) Limited who carry on business as warehousemen and have their main office in Mombasa. On July 1, 1957, the appellants took a lease for five years of a warehouse in Factory Street, Nairobi, from Jafferli Madatally (the respondents' managing director) and his two brothers. The Factory Street premises proved unsuitable and towards the end of 1957 the appellants were anxious to terminate the lease and to find suitable alternative premises. Negotiations took place between Mr. Elliott (a director of Leslie & Anderson and the manager of the Nairobi branch of the appellants' business) and Jafferli with regard to a lease by the respondents

to the appellants of a godown in Clarke Lane, Nairobi. On December 3, 1957, Mr. Elliott on behalf of the appellants wrote to the respondents' firm offering to take the Clarke Lane premises on a three years' lease at a rent of £112 10s. 0d. per month. He made it clear in the letter that his offer was subject to the approval of Mr. Keir, the general manager of the appellants in Mombasa. Following upon receipt of this letter further negotiations took place between Jafferli and Mr. Elliott as

a result of which the appellants entered into possession of the Clarke Lane premises on January 1, 1958. On January 9, 1958, Jafferli wrote a letter to the appellants in these terms:

“In accordance with our mutual arrangement the above godown has been let to you on following terms . . .

- (1) Monthly rental of the godown to be Shs. 2,250/- net payable by you to us in advance.
- (2) The godown has been let to you upon three years lease commencing from January 1, 1958.
- (3) The lease will be prepared by our Solicitors at your expense.
- (4) Water, light and conservancy charges are payable by you.

. . . and usual conditions.”

The appellants replied to this letter on January 13 stating that the terms set out in Jafferli’s letter of January 9 were agreed except No. 2 and that they wished a lease for one year with option of renewal. Subsequently, a further meeting took place between Jafferli and Mr. Elliott following upon which Jafferli on January 25 wrote a letter to the appellants in the following terms:

“We refer to your letter dated the 13th instant, in reply to ours of the 9th instant and to subsequent interview with your Mr. Elliott, it is now agreed that you are renting the godown for a lease of three years from January 1, 1958.

“We are now proceeding to instruct our solicitors to prepare a draft of lease and be sent to you for approval.”

To this letter the appellants replied on February 3 in these terms:

“We are in receipt of your letter of the 25th instant [read ‘January’] and are disappointed that you appear unable to accede to our request for one year’s lease with our option of extending for a further two years. May we ask you to kindly give this matter further consideration.”

On February 17 the respondents’ solicitors sent the appellants two copies of the draft lease for their approval. Further correspondence, to which it is unnecessary to refer, took place between the appellants and the respondents. On May 29, 1958, the appellants gave notice to the respondents of their intention to vacate the premises on June 30, 1958.

In their plaint claiming damages for the appellant’s breach of the agreement the respondents pleaded that an agreement for the lease of the Clarke Lane premises was reached between the parties at Nairobi “in or about January, 1958” and the issues were agreed in these terms:

- “1. Was any agreement for a lease of premises on Plot L.R. 209/1081, Clarke Lane, Nairobi, concluded between parties? If so, for what term and at what rent and upon what conditions?
- “2. If such agreement concluded, can it be sued upon notwithstanding the same is not registered?
- “3. If agreement concluded and can be sued upon what damages?”

There was no dispute as to the damages for which the appellants were liable if the respondents were entitled to succeed on the merits.

In his opening address counsel for the respondents made it clear that his clients’ case was that an oral agreement for a lease of the premises was reached at the end of December, 1957, maintaining that this came within the pleadings

“in or about January, 1958”. No objection was taken on behalf of the appellants and Jafferli’s evidence was that an oral agreement for the lease of the Clarke Lane premises was made by him with Mr. Elliott in December, 1957. Mr. Elliott’s evidence was that no concluded agreement had been made in December, 1957, as to the terms of the lease.

Upon this evidence the trial judge held that no binding agreement had ever been concluded between the parties. He found that the evidence of the discussions between the parties in December, 1957, was inconclusive and that the parties were never ad idem. He therefore dismissed the plaintiff’s claim. When the case came before the Court of Appeal the respondents abandoned their case that a verbal agreement had been concluded in December, 1957, and maintained upon the evidence that an agreement had been concluded at latest in February, 1958. Not unnaturally the appellants’ counsel took serious objection to this new case being argued. The Court of Appeal gave careful consideration as to whether the respondents’ counsel was entitled to raise this new point, but finally concluded that it was open and held that a concluded agreement had been reached before February 17, 1958.

In order to decide whether the Court of Appeal were right in allowing the new point to be argued it is necessary to consider the evidence upon which the Court of Appeal acted together with the grounds of their decision on the merits. The evidence of Mr. Elliott alone was relied on for this purpose. He stated in evidence that the negotiations were subject to the approval of Mr. Keir in Mombasa as had been made clear to the respondents in his original letter of December 3, 1957, and in later conversations. He agreed that discussions might have taken place between December 3 and January 9. His evidence proceeded:

“Before letter No. 6 [letter of January 25] was received I had had a discussion with Jafferli. I told him I would write to Mombasa. It was agreed that we should take a three years lease” . . .

“The next step was for the draft lease to be submitted.”

.....

“The lease was to be formally engrossed.”

“The draft lease provided for a term of three years. By that time confirmation had come from Mombasa for a three years lease. The Head office of Defendant Co. is in Mombasa.”

The Court of Appeal’s view was that the term of three years had been finally agreed between Mr. Elliott and Jafferli before January 25 when Jafferli wrote the letter referred to and that upon Mr. Elliott obtaining the approval of Mr. Keir which must have occurred prior to February 17, the contract was complete.

The first point to consider is what was Mr. Elliott’s position in the negotiations which preceded the obtaining of confirmation from Mr. Keir. Plainly he was only negotiating in December, 1957. He had intimated clearly to the respondents the limitation of his authority. It is not at all apparent to their lordships that at the meeting which Mr. Elliott had with Jafferli in January, 1958, Mr. Elliott as an agent had made a concluded contract with Jafferli for a three-year lease subject to the ratification of his principal. The sentences

“I told him I would write to Mombasa. It was agreed that we should take a three years lease”

which have been fastened on by the respondents are in the context in which they occur equally consistent with his offer being subject to the approval of

Mr. Keir. The exact purport of these conversations might have been further investigated if these had been material to the point before the trial judge.

“In a case where the agent for one party to a negotiation informs the other party that he cannot enter into a contract binding his principal except subject to his approval, there is in truth no contract or contractual relation until the approval has been obtained. The agent has incurred no responsibility.”

(*Watson v. Davies* (1), [1931] 1 Ch. 455, Maugham, J., at p. 468.) Their lordships desire to make this observation in connection with this case. In his judgment Maugham, J., later adds:

“In *Bolton Partners v. Lambert*, 41 Ch. D. 295, the decision of the court was, I think, founded on the view that there was a contractual relation of some kind which could be turned into a contract with the company by a ratification, whilst in the absence of ratification there was a right of action against the agent for breach of warranty of authority. It was admitted that there could be no ratification of a legal nullity. An acceptance by an agent subject in express terms to ratification by his principal is legally a nullity until ratification, and is no more binding on the other party than an unaccepted offer which can, of course, be withdrawn before acceptance.”

([1931] 1 Ch. 469.) It may be that per incuriam his lordship was using the terms “approval” and “ratification” indiscriminately. It is also to be observed that the authority of *Bolton Partners v. Lambert* (2) (1889), 41 Ch. D. 295 was doubted in *Fleming v. Bank of New Zealand* (3), [1900] A.C. 577, Lord Lindley at p. 587. In their lordships’ opinion the evidence does not clearly establish whether Mr. Elliott was negotiating subject to the approval of Mr. Keir or had contracted with Jafferli subject to Mr. Keir’s ratification. If Elliott contracted subject to ratification by his principal there would be no concluded contract until ratification had been obtained. The respondents contended upon the authority of *Koenigsblatt v. Sweet* (4), [1923] 2 Ch. 314, that ratification by the principal can operate back to the date when the contract was made by the agent without the necessity of communication to the other party. But in that case the limitation of the agent’s authority was not known to the other contracting party. In such a case the agent contracts as principal and his principal is bound upon ratification taking place. When, however, the other party to the contract has intimation of the limitation of the agents’ authority neither party can be bound until ratification has been duly intimated to the other party to the contract. It would be contrary to good sense to hold that a concluded contract had been made in these circumstances.

Their lordships now return to the evidence. Mr. Elliott says that confirmation was obtained from Mombasa before February 17, but no date is given. There is therefore no evidence that the ratification by Mr. Keir came before February 3. Before ratification was obtained it was open to the appellants to withdraw (see *Watson v. Davies* (1)). If ratification was not obtained before February 3, their lordships’ view is that withdrawal by the appellants was effectively made and communicated to the respondents by their letter of February 3. The respondents contended that this letter did not amount to withdrawal but was an afterthought on the part of the appellants endeavouring to have the contract which had been concluded re-written. Assuming that no concluded oral contract had been made prior to the respondents’ letter on January 25, the appellants’ letter of February 3 did not amount to an acceptance of a three-year lease. It was either a counter offer of a one-year lease or a withdrawal of the agreement, if made, to a three-year lease. On either view there would have been no concluded contract. Crawshaw, Judge of Appeal, in the Court of Appeal

has assumed that when confirmation was received the contract was complete. He failed to consider the effect of the letter of February 3, if ratification came after that date and the result of a failure to intimate ratification.

Their lordships now address themselves to the preliminary point taken by the appellants that it was not open to the respondents to argue the new point before the Court of Appeal. As their lordships have already indicated it is impossible to consider this point in isolation without reference to the argument based on the rest of the evidence. It was no doubt within the pleadings, it was no doubt within the issues. Equally no doubt it took appellants' counsel by surprise and misled him as to the case which the respondents were making. Nevertheless, if the facts have been fully investigated or if the facts had been fully investigated and the full investigation would have supported the new case, then there would be no objection.

“When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.”

(*Connecticut Fire Insurance Company v. Kavanagh* (5), [1892] A.C. 473 Lord Watson at p. 480.)

In the present case the respondents' case proceeded before the trial judge upon the footing that there was an oral agreement in December, 1957. Before the Court of Appeal the respondents abandoned this case and founded on an oral agreement in January, 1958, relying on the evidence of Mr. Elliott and correspondence. The position of Mr. Elliott in the negotiations was not clear. The question of ratification was never investigated, neither its terms nor its date. It is not possible to say that the result would have been bound to be the same whatever these investigations have revealed. Applying the principles above referred to their lordships have no hesitation in saying that the respondents ought not to have been allowed to argue the new point before the Court of Appeal and they find it impossible to say that the appellants were not prejudiced by the course taken by the Court of Appeal. It follows that as the trial judge held there was no concluded contract, and as his judgment on this point was not challenged, the appellants must succeed.

Their lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment of the Court of Appeal set aside with costs to the appellants and the judgment of the trial judge restored. The respondents must pay the costs of this appeal.

*Appeal allowed. Judgment of the Supreme Court restored.*

For the appellants:

*EF Gratiaen, QC* and *PR Oliver* (both of the English Bar)

*Waltons Bright & Co*, London

For the respondents:

*Sir Frank Soskice, QC* and *JG Le Quesne, QC* (both of the English Bar)

*Knight-Fishers & Blake & Redden*, London

**British Standard Portland Cement Company Limited v Zim Israel Navigation  
Company Limited**  
[1963] 1 EA 391 (SCK)

**Division:** HM Supreme Court of Kenya at Mombasa  
**Date of judgment:** 3 July 1963  
**Case Number:** 168/1962  
**Before:** Pelly Murphy J  
**Sourced by:** LawAfrica

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*[1] Shipping – Carriage by sea – Breach of contract – Dead freight – Shipping space booked for cement – Cement to be loaded at Mombasa for port at Madagascar – Shipping space subsequently cancelled before ship leaves port of origin – Claim for dead freight – Whether claim maintainable when ship sails fully loaded from Mombasa.*

*[2] Shipping – Carriage by sea – Lien – Shipping space booked for cement – Cement to be loaded at Mombasa for Madagascar – Shipping space cancelled before ship leaves port of origin – Claim for dead freight – Offer by same shipper of another cargo at Mombasa – Lien claimed on other cargo when loaded for dead freight arising from earlier booking – Whether lien enforceable.*

*[3] Shipping – Carriage by sea – Usage – Breach of contract – Shipping space booked for cement – Ship not calling at Mombasa – Ship diverted to Mombasa – Shipping space cancelled before ship leaves port of origin – Claim for dead freight – Claim of usage at Mombasa that space booked can be cancelled by reasonable notice.*

### **Editor's Summary**

In October, 1961, the plaintiff company approached the Mombasa agents of the defendant company for shipping space for 1,090 tons of cement which were to be delivered to a customer in Madagascar. The agents informed the plaintiff company that “it might be possible to induce a call at Mombasa for one of their vessels” and on November 8, 1961, the plaintiff company confirmed that it would accept the offer for the cargo space required. On November 11, the plaintiff company’s customer in Madagascar cancelled the order and the plaintiff company immediately advised the agents and cancelled the order for shipping space. At this time the vessel which was to carry the cement had not left port in Israel. However, on November 14 the agents claimed dead freight on the cancelled order liability for which the plaintiff company denied. On December 6 the vessel arrived at Mombasa and on December 8 the plaintiff company had a letter dated December 4 from the agents again claiming dead freight on the ground that the vessel had been directed to Mombasa exclusively because of the plaintiff company’s booking of cargo space. It later transpired that a “shipping schedule” dated December 1 issued by the agents indicated that the vessel would call at Mombasa and then sail for South African ports, no mention being made of a call at Madagascar. On December 8 the plaintiff company received an order from another customer in Madagascar for 1,451 tons of cement and immediately offered this cargo to the agents who

agreed to accept 700 tons stating that the vessel was already “down to her marks” and had stowing problems. It was common ground that the vessel was then virtually fully loaded. The vessel sailed with the 700 tons of cargo after which the agents wrote to the plaintiff company on December 16 reducing their principals’ claim to Shs. 18,493/65 and on December 18 informed the plaintiff company by telephone that their principals intended instructing their agents in Madagascar to claim a lien on the cement unless the claim was met. The plaintiff company accordingly paid the claim under protest and sued the defendant company for its return, alleging in the plaint that the defendant company were the owners of



the vessel. The defence filed denied ownership of the vessel, claimed a lien on the cement and the amount paid by the plaintiff company for dead freight and, in the alternative, counterclaimed the same amount as damages for failure to ship the 1,090 tons of cement. The plaintiff company by an amended reply averred that the defendant company not being the owner of the vessel could not sue on the bills of lading as this was expressly precluded by cl. 17 of the bills of lading. It was further contended by the reply that the booking of shipping space was provisional only and could be cancelled by reasonable notice before the vessel's arrival and that this was also a usage at Mombasa.

**Held –**

- (i) the sailing list showed that the vessel had not sailed from Eilat, Israel, at the time the order for shipping space was cancelled and it was still at Eilat when the defendant company first put forward their claim for dead freight.
- (ii) the amount claimed was paid by the plaintiff company because of the defendant company's threat to claim a lien on the 700 tons of cargo, which was the subject matter of a new contract; the defendant company was not entitled to carry out its threat because nothing was due to them under the new contract.
- (iii) it was never a term of the original booking that the vessel should be specially deviated and the plaintiff company did not know and could not reasonably have been expected to realise that the usage as to cancellation was inapplicable; the deviation of the vessel never formed part of the original contract.
- (iv) there was no consensus ad idem as to deviation and, therefore, no binding contract; consequently the defendant company's counterclaim, based as it was upon the alleged contract of November 8, 1961, failed; further the claim for damages was not proved as the vessel was down to her marks when she sailed from Mombasa.

Judgment for the plaintiff.

**Cases referred to in judgment:**

- (1) *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] 1 All E.R. 1.
- (2) *Re Witt, Ex parte Shubbrook* (1876), 2 Ch. D. 489.

[**Editorial Note:** At the hearing a plea by the defendant company that the court had no jurisdiction by reason of a clause in their bills of lading was abandoned.]

**Judgment**

**Pelly Murphy J:** In October, 1961, the British Standard Portland Cement Co. Ltd. (to which I shall refer hereafter as the cement company) received an order for 1,090 tons of cement. This cement was to be delivered to the customer at the port of Manakara in Madagascar. On receipt of the order, Mr. von Bonin, the cement company's shipping manager, made enquiries of several shipping agents in Mombasa as to shipping space for the cement the subject of the order. One of these was Leslie and Anderson (East Africa) Ltd. (to which I shall refer hereafter as Leslie and Anderson) the Mombasa agents of the Zim Israel navigation Co. Ltd. (to which I shall refer hereafter as Zim Lines). Mr. Mabbs, the shipping

manager of Leslie and Anderson, having examined Zim Lines' sailings from Israel to Madagascar, decided that "it might be possible to induce a call at Mombasa for one of their vessels" and sent a cable to Zim Lines telling them of the cement company's offer of the cargo. On November 3 Mr. Mabbs knew that Zim Lines contemplated the use of the vessel "*Good Fortune*" to take the cement cargo. Mr.

Mabbs said that he told Mr. von Bonin this, informed him that the “*Good Fortune*”

“was not scheduled to call at Mombasa but was scheduled to call at Madagascar and was being diverted to Mombasa if the booking materialised”.

Mr. von Bonin agreed in cross-examination that he may have been told that the vessel intended for his cargo was to be diverted but that “he was not conscious of the fact”. I think that his attitude in the matter may be summarized by saying that it did not matter to him what vessel Zim Lines intended to use and that it did not concern him whether or not the vessel intended for his cargo was being diverted from its scheduled route in order to take it.

It would appear from a sailing list (exhibit E) that, at October 27, 1961, Zim Lines intended that the “*Good Fortune*” should sail from the port of Eilat in Israel on or about November 20 bound for Tamatave (in Madagascar) without making a call at any port in Kenya or Tanganyika on her outward voyage; but that, on her return voyage from Durban to Eilat, she would call at Dar-es-Salaam on December 22 and at Mombasa on December 24. It is, however, to be noted that a “shipping schedule” dated December 1, 1961, issued by Leslie and Anderson indicates that the “*Good Fortune*” on her outward voyage would call at Dar-es-Salaam on December 5 and Mombasa on December 6 and then sail for South African ports (no mention being made of Madagascar).

On November 8 Mr. von Bonin accepted Mr. Mabbs’ offer and “confirmed” that the cement company would take the cargo space offered. On November 11 (a Saturday) Mr. von Bonin received from the customer in Madagascar a cable cancelling the order for cement. On either November 11 or 13 he informed Mr. Mabbs that the customer had cancelled the order and he therefore cancelled his order for shipping space. On November 14 Mr. Mabbs informed Mr. von Bonin that Zim Lines claimed for dead freight on the cancelled order. Mr. von Bonin protested and disclaimed liability therefor. The negotiations between Mr. von Bonin and Mr. Mabbs for shipping space, Mr. von Bonin’s confirmation of the order therefor, the cancellation of the confirmed order and the claim for dead freight were all made verbally. On December 6 the vessel “*Good Fortune*” arrived in the port of Mombasa. On December 8 the cement company received from Leslie and Anderson a letter (dated December 4) in the following terms:

‘Zim Lines – m.v. “*Good Fortune*’.

“We would now confirm our recent telephone conversations, in which we discussed the position arising from the cancellation of your firm booking of space on the subject vessel for December shipment of 1,090 long tons cement destined for Manakara, Malagasy.

“As the direct result of this booking our principals, Zim Lines, Haifa, directed the s.s. ‘*Good Fortune*’ to Mombasa, where she is presently due to arrive at 1700 hours tomorrow. The purpose of this call was to load your cement, although, following news of the booking, our principals secured a small amount of cargo for this area which precluded the cancellation of the call although you have cancelled your booking.

“We now have to call upon you for the payment of dead freight which on the basis of the tonnage and freight rate previously agreed, amounts to U.S. \$8,087.80 less stevedoring, etc., which we estimate to be U.S. \$1,800.

“Please be kind enough to acknowledge receipt of this letter and to let us have an appropriate remittance at your earliest convenience.”

Also on December 8 the cement company received from a different customer in Madagascar an order for 1,450 tons of cement for delivery (in various quantities) to six separate Madagascar ports. Mr. von Bonin offered this cargo to Mr. Mabbs. Mr. Mabbs agreed to accept 700 tons, 300 tons for shipment to Manakara and 400 tons for shipment to Tamatave, but refused the rest of the cargo offered, saying that the “*Good Fortune*” “already had stowage problems and was down to her marks”. The 700 tons were loaded on the “*Good Fortune*” under bills of lading (of which exhibits 8 and 9 are copies) and she sailed from Mombasa on December 9. It is common ground that the vessel was then fully loaded or almost fully loaded. Mr. Mabbs said that she was then “well down in the water”. On December 18 the cement company received from Leslie and Anderson a letter (dated December 16) in the following terms:

“s.s. ‘Good Fortune’.

“We refer to our several recent telephone conversations concerning the cancellation of your booking of 1,090 tons cement per the subject vessel destined for two ports Madagascar. We have already written to you at the request of our principals claiming dead freight for the entire tonnage so cancelled. Our letter dated December 4, 1961, refers.

“Subsequent to the above mentioned letter the vessel arrived in port in order to discharge a small amount of cargo before proceeding to Dar-es-Salaam for which port she had at that time over 400 tons cargo on board. Until the cancellation of your booking the vessel was routed to Dar-es-Salaam first for reasons of stowage and space availability.

“On the morning of the vessel’s arrival at Mombasa you offered approximately 700 tons cement for two ports of discharge Madagascar and although this caused a slight delay to the vessel we were pleased to obtain our principals’ approval of this booking, the cement then being loaded. Following our advice to principals of the tonnage so loaded, we received their instructions to reduce our claim against you for dead freight in respect of the earlier cancelled booking accordingly.

“Please be advised, therefore, that we hold you liable for the sum of Shs. 18,493/65, this amount being calculated with due allowance for stevedoring costs which were not of course incurred.”

On the same date the cement company replied to this letter in the following terms:

“Zim Line – m.v. ‘Good Fortune’.

“Bills of Lading Mombasa/Manakara No. 1 and Mombasa/Tamatave No. 1, covering respectively 300 and 400 tons of Cement to be discharged at Manakara and Tamatave.

“With reference to your telephone message of today, demanding payment of the sum of Shs. 18,493/65 as a condition on your principals discharging the above two consignments of cement, we enclose herewith our cheque for such amount, i.e. Shs. 18,493/65, on the understanding that we do so under protest and with a view to having delivery of our cement effected at Madagascar, and in order to avoid breach of our contract with our customers, i.e. the purchasers of the cement.

“We retain our right to claim this sum from your principals.”

The telephone conversation referred to in that letter was one in which Mr. Mabbs had stated that Zim Lines would instruct their agents in Madagascar

to claim a lien upon the cargo of 700 tons of cement unless Shs. 18,493/65 dead freight was paid. That sum was paid by the cement company.

In this suit the cement company claims the sum of Shs. 18,493/65 which had been paid to Zim Lines under protest. In para. 3 of the plaint the cement company pleaded that Zim Lines were the owners of the “*Good Fortune*”. By their defence Zim Lines denied that they were the owners of the vessel; they pleaded that they had a lien upon the 700 tons of cement (shipped under the bills of lading); that they had a lawful claim for Shs. 18,493/65 for dead freight in respect of the cement not shipped in accordance with the contract of November 8 and they therefore denied the cement company’s claim. They further pleaded that, by reason of a clause in their regular bills of lading (and of the two bills of lading covering the 700 tons which had been shipped), this court had no jurisdiction to try this suit; that the courts of Israel were the agreed forum for the disposal of disputes and that the laws of Israel governed the rights and liabilities of the parties. Zim Lines further and in the alternative counterclaimed for Shs. 18,493/65 damages for the cement company’s failure to ship 1,090 tons of cement in accordance with the contract of November 8

“being the value of the freight space from Mombasa to Manakara for 401.056 tons of cement as contracted for . . . but not utilized”.

In the counterclaim they repeated their pleading that this court had no jurisdiction.

When the hearing commenced Mr. Bryson for Zim Lines informed the court that he wished to abandon the plea as to jurisdiction. After argument, leave to amend the defence and counterclaim was given, it being understood that it would be open to the cement company to argue and the court to hold that, by their original pleading, Zim Lines had made an election as to jurisdiction which election was binding upon them. The amended defence and counterclaim differs from that originally filed in that it contains no plea denying this court’s jurisdiction and contains a new plea electing that the counterclaim be tried by this court.

The cement company had filed a reply to the original defence. Leave was given to amend that reply. Paragraphs 2, 5, 6, 7 and 8 of the amended reply are as follows:

“2. In further answer to para. 2 of the defence the plaintiffs state the defendants are not characters by demise of the said m.v. ‘*Good Fortune*’ and state if the defendants are not the owners of the said vessel as is alleged in para. 3 of the defence the defendants cannot sue on the said bills of lading or either of them in consequence of the express provisions of cl. 17 of the said bills of lading which said paragraph reads as follows:

‘If the vessel is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything which appears to the contrary) the bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.’

“5. With reference to para. 9 of the defence the plaintiffs state as follows:

(a) no concluded contract as alleged in sub-para. 9 (1) was made and the plaintiff company admits that it booked space on the said m.v. ‘*Good Fortune*’ for 1,090 tons of cement for shipment from Mombasa to Manakara in the Malagasy Republic at the freight rate of Shs. 53/00 but that understood between the plaintiffs and the

said Leslie and Anderson (East Africa) Limited with whom the said booking was effected that such booking was provisional and could be cancelled by notice given a reasonable time before the ship's date of arrival: the said booking was cancelled on or about November 11, 1961, by notification given to Leslie and Anderson (East Africa) Limited on or about such date. In the alternative the plaintiffs will allege that there is a custom at Mombasa whereby space booked on any vessel on regular service can be cancelled by notice given a reasonable time before the ship's arrival and that pursuant to this custom the space booked was cancelled on or about November 11, 1961.

- (b) The plaintiffs admit the averments contained in para. 9 (2) of the defence.
- (c) The plaintiffs deny the averments contained in para. 9 (4) of the defence.
- (d) The plaintiffs deny the averments contained in paras. 9 (5), 9 (6) and 9 (8) of the defence: the plaintiffs state that the said 688.94 tons of cement shipped were shipped as alleged in para. 4 of the plaint and were not a part shipment under the contract alleged in para. 9 (1) of the defence as the defendants well know.
- (e) With reference to para. 9 (7) of the defence the plaintiffs state that cl. 12 of the said bills of lading refers only to goods shipped under the bill of lading in question.
- (f) The plaintiffs will allege that if any contract was made as alleged in para. 9 (1) of the defence (which is denied) then such contract was made between the plaintiffs and one Leslie and Anderson (East Africa) Limited which latter company was acting for the owners (or alternatively charterers by way of demise) of the m.v. '*Good Fortune*' and not for the defendants.

#### Defence of Counterclaim

6. The plaintiffs deny the averments set out in para. 10 of the defence; and, the plaintiffs repeat their averments set out in para. 5 hereof.

"The plaintiffs deny that the defendants have suffered the damage alleged or at all and will put the defendants to strict proof thereof.

- "7. With reference to para. 12 of the amended defence and counterclaim the plaintiffs will allege that pursuant to their original defence and counterclaim dated September 6, 1962, the defendants elected pursuant to the said para. 3 of the said bill of lading to have their counterclaim adjudicated upon and tried before the Israel court in Haifa: the plaintiffs will refer to para. 12 and para. 10 of the said original defence and the plaintiffs will allege that the defendants are bound by such election and this honourable court has no jurisdiction to try the counterclaim.

- "8. With further reference to paras. 10, 11 and 12 of the defence the plaintiffs repeat the averments contained in para. 2 hereof and in para. 5 (b) hereof and state that pursuant to cl. 17 of the said bill of lading the defendants have no vested right to counterclaim, the right to counterclaim (if any, which is denied) being vested in the owner or charterer by demise of the m.v. '*Good Fortune*'."

When the evidence for Zim Lines was concluded Mr. Bryson informed the court that he was instructed not to press the defence to the claim and he made no submissions thereon. As, however, he did not concede the cement company's

claim I must, as briefly as possible, express my opinion and make a finding thereon.

It would appear that, in effect, Zim Lines allege that the cement company repudiated the contract of November 8. If there was a repudiation, Zim Lines could have insisted that the company should fulfil its side of the bargain and tendered its readiness to perform its side or, alternatively, Zim Lines could have accepted the repudiation, made it clear that the contract was at an end and sued at once for damages. Zim Lines adopted neither of these alternatives. The sailing list (exhibit E) shows that the “*Good Fortune*” had not sailed from Eilat at the time when Mr. von Bonin cancelled his order for shipping space and that the vessel was still in Eilat when Zim Lines first put forward their claim for dead freight.

I am satisfied that, after the arrival of the vessel in Mombasa, Zim Lines, through their agents, entered into a new contract with the cement company for the shipment of a different cargo of cement. On December 18 the claim for dead freight was paid under protest. I am satisfied that the amount claimed was paid by the cement company because of Zim Lines’ threat to claim a lien on the cargo the subject matter of the new contract. In my opinion Zim Lines were not entitled to carry out their threat because nothing was due to them under the new contract. I find that the money paid to them under protest is money had and received for the cement company which they must repay.

Turning now to the counterclaim, Mr. Bryson submits that there was a binding contract made on November 8. He says that that contract was one between Zim Lines (through their agents Leslie and Anderson) and the cement company. Now it seems to me clear that the contract, if there was one, was a contract of affreightment. But such a contract is one made between the owner of the vessel and the shipper. Zim Lines, however, have pleaded that they were not the owners of the vessel. It has been admitted that they were not charterers by demise and they do not claim to have been time-charterers. They have pleaded that it was an implied term of the contract that the cargo would be shipped subject to the terms and conditions of their regular form of bill of lading. Clause 17 of that bill of lading is in the following terms:

- “17. If the vessel is not owned by or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.”

How then can Zim Lines claim to be a party to the contract? Mr. Bryson submits that the last paragraph of cl. 26 of the bill of lading gives them the right to enforce the contract. That paragraph reads:

- “All rights given to the vessel and/or the representative hereunder or in connection herewith can be exercised and enforced, and all proceedings hereunder or in connection herewith, may be instituted and prosecuted by any one of the carrier, the master, the agents and the representatives, or by all or any of them jointly and severally.”

Clause 26 of the bill of lading was not pleaded by Zim Lines. But even if it had been pleaded, I am doubtful if Zim Lines could rely upon its terms to give them a right of action for freight under the bill of lading in view of the explicit provisions of cl. 17. In my opinion the speeches of Viscount Simonds and Lord Reid in *Scruttons Ltd. v. Midland Silicones Ltd.* (1), [1962] 1 All E.R. 1, are indicative that, on the facts of this case, Zim Lines have no right of action.



I do not think that they have. I prefer, however, to base my decision on the assumption that they have such a right.

Assuming then that Zim Lines have a right to sue under the bill of lading, does Mr. von Bonin's "confirmation" of his booking of cargo space of November 8 and his cancellation of that booking some three days later give Zim Lines a right to recover damages for breach of contract? The cement company claims that there is a recognised practice in the port of Mombasa that a booking of cargo space in a particular vessel of a "regular line" may be cancelled by either the shipper or the ship owner at any time before a written shipping application has been made by the shipper and accepted in writing by the ship owner (or his agents) and that such a cancellation by either party is never treated as a breach of contract entitling the other party to claim damages. Mr. von Bonin said that the "*Good Fortune*" was a vessel of a regular line. This alleged practice has been referred to throughout these proceedings as a "custom" but I think that it should be called a usage. Such a usage must be established by the party who sets it up and in order to establish it, he must show that it is notorious, certain and reasonable. It has been said that a usage is not proved by merely bringing the person interested in establishing its existence to give oral evidence of its existence unsupported by any other evidence (*Re Witt, Ex parte Shubrook* (2) (1876), 2 Ch. D. 489 at p. 492). In the instant case the only evidence as to the existence of the alleged usage given on behalf of the cement company was that of Mr. von Bonin and if his evidence had been challenged and no other evidence had been given I would have had doubts about its sufficiency. I think that the cement company would have been well advised to call an independent witness to testify to the usage alleged by it. But Mr. Mabbs agreed in cross-examination that, with regard to all vessels calling at Mombasa which are running on a "regular service", "firm bookings" of cargo space may be cancelled by either the ship owner or the shipper without any penalty (save the commercial sanction of loss of goodwill between the parties). He agreed that Zim Lines' service from Eilat to Madagascar and then to Durban returning thence to Eilat via East African ports was a regular service. As I understood his evidence in general on this aspect of the matter, Mr. Mabbs agreed that the booking of November 8 would have been open to cancellation in this case but for the fact that the "*Good Fortune*" had allegedly been specially deviated from her scheduled route to call at Mombasa for the cement company's cargo. Mr. von Bonin was definite that the practice applied in the facts of this case. As, therefore, the practice has been admitted by Zim Lines to exist in the case of vessels on a regular service (and, in particular, to the "*Good Fortune*" subject to the question of her deviation), I am of opinion that notoriety is not in issue. The practice is, I think, conceded to be a reasonable one and, in view of the fact that it is agreed that either party to a booking of cargo space is at liberty to cancel the booking, I find it to be reasonable. Mr. Bryson contends, however, that the practice has not been established with sufficient certainty to justify a finding that it has become a usage. I do not agree with this contention. In my opinion the usage has been established as relating to the "*Good Fortune*" and Zim Lines are, in effect, contending that in the case of this particular cargo, the usage did not apply because they had deviated the vessel. In other words I think they are contending that the facts of this particular case bring it outside the scope of the agreed usage – that the deviation makes this case an exception to the general rule.

I have already mentioned that the cement company's cancellation of the booking occurred before the "*Good Fortune*" sailed from Eilat and that it would appear from Leslie and Anderson's shipping schedule dated December 1 that she was then expected to call at Dar-es-Salaam before Mombasa. In such circumstances I cannot see how it can be said that the vessel was deviated for



the cement company's cargo. Moreover, Mr. Mabbs agreed that when Mr. von Bonin first asked for cargo space he (Mr. von Bonin) must have had the usage as to cancellation without penalty in mind. He further agreed that, when he told Mr. von Bonin that the vessel was being deviated to collect the cement company's cargo, he did not tell him that he would look to the cement company for damages if the cargo was not forthcoming. He agreed that he thought the claim for dead freight was unusual and that he had never previously made such a claim in respect of any vessel whether deviated or not. Mr. von Bonin said that such a claim would only be sustainable in the case of a charter or part-charter. It is perhaps significant that when Zim Lines were informed by Leslie and Anderson that the cement company had cancelled its booking of cargo space, they replied that they would hold the "charterers" responsible. It is common ground that the cement company was not a charterer or part charterer of the vessel. Mr. Mabbs agreed that Leslie and Anderson did not inform Zim Lines of the usage in relation to cancellation of bookings until after the cement company's reply to the defence and counterclaim had been filed. I find that it was never a term of the agreement as to the booking that the "*Good Fortune*" was to be specially deviated and that the cement company did not know and reasonably have been expected to realize that the usage as to cancellation was (as Zim Lines now contend) inapplicable. In my opinion the deviation of the vessel never formed part of the alleged contract I find that there was no consensus ad idem as to deviation and therefore no binding contract. In my opinion Zim Lines' counterclaim, based as it is upon the alleged contract of November 8, must fail.

Having come to this conclusion it is unnecessary for me to deal with the question of the damages claimed by Zim Lines. But in case I am wrong, I would say that in my opinion Zim Lines failed to substantiate their claim for damages. Although the cement company asked for its production, the stowage plan of the vessel was not produced by Zim Lines. It is common ground that when she sailed from Mombasa the "*Good Fortune*" was down to her marks. There is no evidence as to what cargo (if any) was loaded on to the vessel at Dar-es-Salaam after she had discharged there.

An interesting point as to jurisdiction was raised on the pleadings. Mr. Cleasby submitted that Zim Lines had elected under cl. 3 of the regular form of their bill of lading that "all questions and disputes" arising thereunder should be brought before and tried by the courts of Israel and that they were bound by this election. In view, however, of my finding on the question of the alleged contract I do not propose to decide this point.

I should, perhaps, mention one other matter. Throughout the trial reference was made to Madagascar. For that reason I have used that name in this judgment although Madagascar is now known as Malagasy.

There will be judgment for the cement company for Shs. 18,493/65, interest and costs. Zim Lines' counterclaim is dismissed with costs.

*Judgment for the plaintiff.*

For the plaintiff:

*RP Cleasby*

*Atkinson, Cleasby & Co, Mombasa*

For the defendant:

*JEL Bryson*

*Bryson & Todd, Mombasa*

**Oliver John Shaw v R**  
**[1963] 1 EA 400 (HCU)**

**Division:** High Court of Uganda at Kampala  
**Date of judgment:** 12 August 1963  
**Case Number:** 300/1963  
**Before:** Udo Udoma CJ  
**Sourced by:** LawAfrica

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*[1] Street traffic – Driving under the influence of drink and driving dangerously – appeal – Misdirection on fact alleged – Onus on appellant to show that findings unreasonable – Misdirection – Traffic Ordinance, 1951, s. 41, s. 43 (U.) – Road Traffic Act, 1930, s. 11 (1) and s. 49 (b) (U.K.).*

**Editor's Summary**

The appellant was convicted on two counts of driving under the influence of drink and in a manner dangerous to the public. The appellant was fined Shs. 2,000/- or six months' imprisonment and disqualified from holding a driving permit for four years in respect of the first count and on the second count he was sentenced to a fine of Shs. 500/- or three months' imprisonment. The magistrate in his judgment carefully and thoroughly examined the evidence, came to the conclusion that the witnesses for the prosecution were truthful and reliable and accepted their evidence. On appeal against conviction and sentence it was argued for the appellant that the magistrate had misdirected himself on the facts and as to the onus of proof. For the Crown it was submitted that the appellant must satisfy the court that the findings of the magistrate were unreasonable and could not be supported by the evidence and that there had been no misdirection upon the burden of proof.

**Held –**

- (i) on appeal against conviction on grounds of misdirection as to the facts, the onus is on the appellant to show that the findings are unreasonable and cannot be supported having regard to the evidence.
- (ii) the magistrate's findings that the appellant was under the influence of drink and unfit to drive were not unreasonable and were amply supported by the evidence.
- (iii) on the evidence there was no misdirection in law because the passage in the judgment dealing with the burden of proof of which complaint was made referred to the onus of proof in regard to the defence of automatism and not to the burden of proof in a criminal case generally.
- (iv) it was impossible to say that in imposing the sentence he did the magistrate had exercised his discretion perversely and, accordingly, the appeal against sentence could not succeed.

Appeal dismissed.

**Cases referred to in judgment:**

(1) *R. v. Mary Broadhurst and Others*, 13 Cr. App. R. 125.

(2) *Hill v. Baxter*, [1958] 1 All E.R. 193.

(3) *R. v. Evans*, [1962] 3 All E.R. 1086.

(4) *Chapman v. O' Hagan*, [1949] 2 All E.R. 690.

## **Judgment**

**Udo Udoma CJ:** The appellant in this appeal was charged with two counts of:

- (i) Driving a motor vehicle when under the influence of drink contrary to s. 41 of the Traffic Ordinance, 1951; and

- (ii) Driving in a manner dangerous to the public contrary to s. 43 of the Traffic Ordinance, 1951.

He was tried and convicted by the resident magistrate in the district court of Mengo. He was sentenced to a fine of Shs. 2,000/- or 6 months' imprisonment in respect to the 1st count and disqualified from holding a driving permit for 4 years. On the 2nd count he was sentenced to a fine of Shs. 500/- or 3 months' imprisonment. He was allowed 14 days within which to pay both fines. He now appeals against the conviction and sentence and the order of disqualification.

There are six grounds of appeal as follows:

- (1) The learned magistrate erred in accepting the evidence of the witness Hans Thomas that appellant had no injury before getting out of his car at the corner of Port Bell Road and in failing to hold that the said witness merely failed to observe the injury
- (2) The learned magistrate erred in believing that the injuries received by appellant would have been caused in falling out of the car in the manner stated by Hans Thomas and in failing to hold that these said injuries were more consistent with having been received prior to the time when appellant was observed by Hans Thomas.
- (3) The learned magistrate erred in holding that appellant admitted that he did not bother to find out anything about the facts until he knew he was to be prosecuted, in the absence of any evidence to that effect.
- (4) The learned magistrate erred in law in holding that for the defence to succeed it was necessary for appellant to establish a probability that there may have been concussion, and in basing his decision to convict upon this erroneous view of the law.
- (5) The learned magistrate should, on the evidence, have held that accused might have been suffering from the effects of concussion and that his actions were affected thereby and may not have been due to consumption of alcohol.
- (6) In any event the sentences and in particular a suspension of appellant's driving licence for a period of 4 years was excessive, "in view of appellant having driven without any previous offence for 27 years, and the exceptional circumstances relating to appellant's state of health and his ignorance of the possible results of drugs prescribed for him".

Before dealing with these grounds of appeal it is convenient to summarise the evidence as was presented before the learned magistrate. The case before the magistrate was that on Saturday, February 16, 1963, at about 1 p.m. the appellant went into the International Bar with his two dogs and there had a few drinks. Then at about 4 p.m. while one Hans Thomas (PW. 2) was driving his car along Acacia Avenue downhill towards the Golf Course Club, he saw a car – a Hillman Minx, which was then being driven by the appellant. The car was being driven in a zigzag manner, that is to say, it was swerving from one side of the road to the other thereby creating confusion.

Hans Thomas (PW. 2) who felt confused by the car zigzagging along the road in that manner, decided to follow it, and did so. At the bottom of the hill he noticed that the car was being driven along the right-hand side of the road as if about to turn into the Golf Club. Hans Thomas (PW. 2) then tried to overtake it on the left-hand side of the road. Suddenly the car swerved to the left-hand side of the road, and it was therefore necessary for Hans Thomas to apply his brakes, which he did with great violence in order to avoid collision with the appellant's car. Whereupon the appellant then drove his car uphill towards the junction of Acacia Avenue and Kitante Road. He was followed by Hans

Thomas (PW. 2). Before the junction of Acacia Avenue and Kitante Road the appellant's car stopped. It then rolled backwards for about 10 yards whereby its two rear wheels mounted the pavement, and the car then swerved at right angles into the road. Thereafter it turned into Kitante Road. Hans Thomas (PW. 2) still continued to follow the appellant as he was convinced that there was something wrong with the appellant's car, which then continued in a zigzag manner along Kitante Road, hitting the kerb of the road several times on the left-hand side.

With increased speed the appellant's car took the long bend by the slope before the junction and passed the roundabout uphill to the Police Station. Near to the Police Station both wheels of the car mounted the pavement, the nearside wheels of the car travelling on the pavement for about 15 yards and then back on to the road, and was driven downhill at such increased speed of about 45 m.p.h. that it narrowly missed colliding with some cyclists who were then on the road.

The appellant then drove on towards the Port Bell Road junction. As he was about to turn right into Port Bell Road at the junction, he overshot the turning and hit the kerb on the right-hand side of Jinja Road and stopped. The appellant then tried to change his gear into reverse and to proceed on the journey but was unable to do so. Thereupon Hans Thomas, who was still following behind the appellant's car, stopped and parked his car to the left side of the road, alighted therefrom and walked up to the appellant's car. He attempted to open the left-hand side front door of the appellant's car but discovered that it was locked. The appellant undid the locking device and Hans Thomas (PW. 2) opened the door while the appellant looked on. The appellant was then sitting on the driver's seat. Hans Thomas removed the ignition key which was then in the ignition lock and took possession of it. He went away with the key back to his car. He stood by his own car.

The appellant crawled over the seat of his car on the left side and, in trying to get out, fell out of the car on to the ground on his hands and feet. He sustained injuries on his forehead. He had a small cut. He got up eventually after some time and walked over to Hans Thomas (PW. 2). He spoke to him. He told him that he had stolen his keys. Hans Thomas (PW. 2) made no reply as he felt it useless to do so since he was convinced the appellant was drunk. He then noticed that the appellant was sweating. His eyes were deep, and his eyelids half closed. The appellant was bleeding profusely from a cut over his left eye.

Just at that time another car which was driven by an Asian arrived at the scene. It stopped there; but when requested by Hans Thomas (PW. 2) to go to the police the driver of that car made no effort to do so. Then a police patrol car with an inspector of police on board arrived, and Hans Thomas (PW. 2) handed over the appellant's ignition key to the inspector of police. The appellant was thereupon arrested and driven away in the police car to the Jinja Road Police Station. There it was observed that the appellant smelt strongly of drink. His eyes were red and his eyelids heavy. His tongue was also heavy. When interrogated the appellant could not pronounce his name properly. He said that somebody had banged into him, but could not say where. He denied having had any drink.

On being tested the appellant could not stand properly. He swayed from side to side and had to hold on to a table in order to support himself. When told that he was suspected of being drunk and that he should be medically examined, the appellant should: "—, I am not accepting any kind of examination". Having refused to be medically examined, he complained that he was unlawfully arrested, and that he should be allowed to go. From time to time the appellant fell asleep on the table at the police station, and on waking up, would shout, "who is in charge of this station?"

In his defence the appellant who described himself as a slow, regular moderate drinker, gave evidence on oath. He could only recollect having taken two Besperax sleeping tablets in the early morning hours of February 16, 1963, that is to say, the day of the incident, of going to work thereafter as usual that day, and of feeling quite fit but excited and exhilarated. He remembered visiting the International Bar with his two dogs with the intention of taking the dogs to Port Bell later, and of taking two beers and probably a brandy afterwards at the bar.

Thereafter he had no recollection of what had happened. He could not say how in leaving the bar he had driven the 3 miles distance to the Port Bell junction. He could not remember meeting Hans Thomas that day or the events at the police station. He was certain, however, that he was not tested at the police station because he remembered voluntarily standing on one leg when he thought he was considered drunk. He was asked if he wanted a doctor and he had refused to see one, but that was in connection with the wound on his left eyebrow, which, in any case he had no idea how it had come about. He only saw Dr. Lawrence (DW. 2) on Tuesday, February 19, 1963, that is, 3 days after the incident, when he knew that he was going to be charged by the police.

Under cross-examination the appellant said:

“I have never had concussion and I have never had amnesia. I have no real recollection of anything from the time I got into the bar until the Port Bell turning. My amnesia probably started at the International bar.”

The appellant also called evidence as to his character and the state of his health generally as well as medical evidence as to the possible effect of the sleeping tablets he had taken on February 16, 1963, both of which evidence was said to be in mitigation in the event of a conviction.

The learned trial magistrate in his judgment carefully and thoroughly examined the whole of the relevant evidence before him and came to the conclusion that the witnesses for the prosecution were truthful and reliable, and in particular that Hans Thomas, the principal witness for the prosecution, was also public-spirited. He accepted their evidence and convicted the appellant as already stated above.

The appellant now complains that the learned magistrate was wrong in so doing, that being the substance of the complaint against the judgment of the learned magistrate which has emerged from the arguments addressed to this court in respect of grounds 1, 2, 3 and 5 of the grounds of appeal which I now propose to consider together.

Mr. Wilkinson for the appellant has submitted that the learned magistrate was wrong in accepting the evidence of the witness for the prosecution and also in holding that Hans Thomas (PW. 2) was public spirited as it was more likely that the latter was actuated by curiosity rather than public-spiritedness. Hans Thomas' power of observation was severely attacked in that it was said that he failed to observe the cut on the eyelid of the appellant before the appellant fell out of his car at the junction of Port Bell Road. It was said that the learned magistrate did not properly direct his mind to the various aspects of the case because he failed to find that the appellant was probably involved in an accident resulting in concussion and amnesia prior to the incident at the Port Bell Road junction.

After having carefully considered these submissions, I agree with the contention of Mr. Keeble, counsel for the respondent, that the issue before the court was one which turned on the facts and that it is the duty of the appellant to satisfy this court that the findings of the learned magistrate are unreasonable and cannot be supported having regard to the evidence. To put it another way,

as was laid down by the Court of Criminal Appeal in *R. v. Mary Broadhurst and Others* (1), 13 Cr. App. R. 125 at p. 130:

“If there has merely been a misstatement of or a failure to state facts there may have been a miscarriage of justice, and the onus is on the appellant to show that on a reasonable view of the facts and with a proper direction therein, the result might well have been different. If the appellant fails to show this the conviction must stand.”

Now, here was a case which depended in the main on the oral testimony of witnesses, the evidence for consideration being one-sided, for be it remembered, the appellant was not of assistance to the court in that he could hardly recollect the incidents connected with the offence with which he was charged, yet it was argued that the learned magistrate was wrong in accepting the only material evidence before him, and therefrom drawing the only reasonable and irresistible inference. The medical evidence concerning the possibility of the appellant having had concussion and amnesia was said to have been given in mitigation in the event of a conviction.

Surely it is not unreasonable to suppose (although the learned magistrate did not appear to have taken that view) that it is only in a case in which an accused person has felt the full force and effect of the prosecution case against him that he may resort to the expedient of calling evidence as to his character and other facts in mitigation as was done in this case.

It is even difficult to see how the evidence that the appellant was under the influence of a drug could have been considered in mitigation when, under the section of the Ordinance under which the appellant was charged, it is an offence to drive or to attempt to do so while under the influence of a drug to such an extent as to be incapable of having a proper control of a motor vehicle. Be that as it may, the learned magistrate did not accept the evidence, and I think, quite rightly. The evidence of Dr. Lawrence (DW. 2) for instance was highly speculative.

The learned magistrate, having reviewed the whole of the evidence before him, concluded as follows:

“And in my judgment having regard to the evidence as a whole the accused must have known before he got into his car that he was not in a fit state to drive. I find therefore that the accused was under the influence of drink to such an extent as to be incapable of having proper control of his motor vehicle and I convict him on count 1.”

I am unable to say that these findings were unreasonable and cannot be supported having regard to the evidence. On the contrary I am satisfied that there is ample evidence to support them. Grounds 1, 2, 3 and 5 of the appeal therefore fail.

I turn now to consider ground 4 which raises a difficult question of law. The contention is that the learned magistrate misdirected himself on the issue as to the onus of proof, and that that misdirection has occasioned a miscarriage of justice. In the concluding passage of his judgment the learned magistrate had said:

“It is sufficient for the defence to raise a reasonable doubt in the mind of the court whether there may not have been concussion to account for the accused’s irresponsible behaviour, it is sufficient not for the defence to establish a probability that there may have been concussion for the defence to succeed.”

It has been submitted that that is a wrong statement of the law since in criminal cases the burden of proof on the prosecution never shifts, and that



there was no burden at all on the appellant to establish a probability that he might have suffered from concussion before arriving at the Port Bell junction. Counsel for the appellant seems to have overlooked the fact that the learned magistrate was in that passage dealing with the onus of proof in regard to the defence of automatism. The passage appears to have arisen from a consideration by the learned magistrate of a passage by Lord Goddard, C.J., in *Hill v. Baxter* (2), [1958] 1 All E.R. 193 at p. 195, in which in a case stated by the Justices on a charge under s. 11 (1) and s. 49 (b) of the English Road Traffic Act, 1930, on the question of mens rea, Lord Goddard, C.J., had said:

“The first thing to be remembered is that the Statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into the offence; it is no answer to a charge under these sections to say, ‘I did not mean to drive dangerously’, or ‘I did not notice the halt sign’. The justices’ finding that the respondent was not capable of forming any intention as to the manner of driving, is really immaterial. What they evidently meant was that the respondent was in a state of automation. But he was driving and, as the case finds, exercising some skill, and undoubtedly the onus of proving that he was in a state of automation must be on him. This no doubt, is subject to the qualification that where an onus is on the defendant in a criminal case the burden is not as high as it is on a prosecutor.”

It is of interest to note that that statement of the law as to the onus of proof where automation is raised by the defence was subsequently approved and applied in *R. v. Evans* (3), [1962] 3 All E.R. 1086. In my view this dictum of Lord Goddard, C.J., is far stronger than the passage in the learned magistrate’s judgment now complained of, which seems to me to be a paraphrase of a statement of the law by Devlin, J., as he then was, in *Hill v. Baxter* (2); There Devlin had said:

“I agree that if the onus lies on the defence to produce some evidence of automatism, they have failed to do so, with the result that the justices came to a wrong conclusion in law. It would be quite unreasonable to allow the defence to submit at the end of the prosecution’s case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time sober, or not sleep walking or not in a trance or blackout. I am satisfied that such matters ought not to be considered at all until the defence has produced at least *prima facie* evidence.”

On the evidence in the instant case, I am satisfied that there was no misdirection in law. In the event it is possible to hold otherwise, I am satisfied that no miscarriage of justice has occurred. The learned magistrate was fully conscious of the fundamental principle of law as to the burden of proof in a criminal case as he clearly stated so in this passage of his judgment when he said:

“The burden of proving the guilt of the accused always rests upon the prosecution and never shifts on the defence.”

I have given considerable thought to the question of sentence and, in particular to the period of suspension of the appellant’s driving permit. It may be that if the appellant had been tried by this court different sentence might have been imposed if he was found guilty. The learned magistrate held that this was a serious case of drunkenness and dangerous driving and that he took into consideration the mitigating circumstances which had been urged upon him. In the circumstances and on the authority of *Chapman v. O’Hagan* (4), [1949] 2 All E.R. 690, I find myself unable to substitute my discretion for that of the



learned magistrate as it is impossible to say that the exercise of his discretion in all the circumstances of this case is perverse.

In the result this appeal must be dismissed. Order accordingly.

*Appeal dismissed.*

For the appellant:

*PJ Wilkinson, QC and B De Silva*  
*Wilkinson & Hunt, Kampala*

For the respondent:

*OJ Keeble*  
*Hunter & Greig, Kampala*

## **Martino Judagi and others v West Nile District Administration** [1963] 1 EA 406 (HCU)

**Division:** High Court of Uganda  
**Date of judgment:** 2 September 1963  
**Case Number:** 467 to 473/1963  
**Before:** Udo Udoma CJ  
**Sourced by:** LawAfrica

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[1] *Criminal law – Practice – African court – Record containing no details of charge and particulars – Importance of recording charge and its particulars – African Courts Ordinance, 1957, s. 12 (U.).*

[2] *Criminal law – Jurisdiction – Nullity – African court – Case tried without jurisdiction – Trial a nullity – African Courts Ordinance, 1957, s. 8 and s. 10 (U.) – Penal Code (Cap. 22), s. 228 (U.).*

### **Editor's Summary**

The appellants were charged in the District African Court of West Nile with an offence under s. 228 of the Penal Code. The record stated that the charge was read and explained to them and that they, having understood it, pleaded not guilty thereto. The charge itself and the particulars of it were not set out anywhere in the record. The appellants were convicted but on appeal the State Attorney intimated that he was unable to support the conviction since the court had no jurisdiction to try the offence charged.

### **Held –**

- (i) it is the duty of any court, subordinate as well as African courts, before which an accused person is tried, to record in full, at the beginning of the proceedings and before recording of the pleas, the

particulars of the charge and the relevant section of the law, if any, under which the charge read and explained to the accused and to which the pleads is laid.

- (ii) the District African Court of West Nile had no jurisdiction to try and convict the appellants of an offence under s. 228 of the Penal Code and accordingly the trial was a nullity.

Appeal allowed. Conviction quashed and sentences set aside. Case remitted for re-trial by a subordinate court.

### **Judgment**

**Udo Udoma CJ:** This is an appeal against conviction and sentence imposed on the nine appellants by the District African Court of West Nile. At the trial when the appellants appeared before the court, it is recorded that the charge against them was read and explained to them, and that they having understood the same pleaded “Not Guilty” thereto. The charge itself and the particulars thereof do not appear to have been set out nor anywhere recorded in the proceedings. That, of course, is a serious omission in view of the point of law which has been raised and argued in this appeal. It

is also wrong in that it is difficult to ascertain on the face of the record the charge to which the appellants had pleaded.

It cannot be overstressed that it is the duty of any court before which an accused person is tried, the subordinate as well as the African courts, to record in full, quite clearly at the beginning of the proceedings immediately after the heading and the names of the respective parties to the proceedings but before the recording of the pleas, the particulars of the charge and the relevant section of the law, if any, under which the charge read and explained to the accused and to which he pleads is laid. If in the course of the trial, the charge is amended then the amended charge together with the new plea should be recorded in the body of the proceedings at the appropriate stage at which the amendment is made.

In the present appeal the only indication of the charge for which the appellants were tried and convicted appears in the last sentence of the judgment of the court, in these terms:

“I found the nine accused persons guilty as charged under s. 228 of the Penal Code.”

But for that sentence, it would have been impossible to ascertain the law under which the appellants were charged, tried and convicted.

The district court of West Nile is an African court and therefore not subject to strict rules of procedure. It cannot, however, be denied that it would be in the interest of all concerned if the practice as to the recording of charges in the proceedings as outlined above were observed. Such practice, this court is convinced, would be in the spirit and intendment of the provisions of s. 12 of the African Courts Ordinance, 1957, which enjoins African courts in regard to their practice and procedure to be guided by the provisions of the Criminal Procedure Code and the practice and procedure of subordinate courts in matters of a criminal nature.

The point which has been raised and argued before this court by the learned State attorney, Mr. Hebron, who appeared for the respondent, and to which I shall now turn my attention is a fundamental one, and goes to the root of the whole proceedings and trial in the court of West Nile. Mr. Hebron has submitted that he is unable to support the conviction of the appellants by the District African Court of West Nile on the ground that the trial was a nullity for want of jurisdiction, in that the court purported to have tried the appellants for an offence created under s. 228 of the Penal Code.

Now the jurisdiction of the District African Court of West Nile is prescribed under s. 8 and s. 10 of the African Courts Ordinance, 1957. And the sections of the Ordinance which are relevant for the purpose of this appeal are s. 8 (c) and s. 10 (1). The provisions of s. 8 (c) are as follows:

- “8. Subject to any express provision to the contrary, no African court shall have jurisdiction in
- (a) . . . . .
  - (b) . . . . .
  - (c) any proceedings taken under any ordinance or any English or Indian law in force in the Protectorate unless such court has been authorised to administer or enforce such ordinance or law under the provisions of s. 10 of this Ordinance or the provisions of any other Ordinance.”

And s. 10 (1) provides:

“The Governor may by order in the *Gazette* confer jurisdiction on all African courts or on any African or class of African court to administer

and enforce all or any of the provisions of any Ordinance or English or Indian law in force in the Protectorate subject to such restrictions or limitations that he may impose.”

It is to be observed that s. 8 of the Ordinance is prohibitive in form. It therefore becomes the duty of the African Court of West Nile to satisfy this court that it has been authorised to administer or enforce s. 228 of the Penal Code under the provisions of s. 10 of the African Courts Ordinance. In other words, it must justify its exercise of jurisdiction in having tried the appellants for an offence alleged to have been committed contrary to s. 228 of the Penal Code. That brings me to a consideration of Notice No. 73 of 1962.

By Legal Notice No. 73 of 1962 the Governor in the exercise of the powers conferred on him by virtue of s. 10 (1) of the African Courts Ordinance, No. 1 of 1957, conferred on African Courts in the District of West Nile jurisdiction to administer and enforce certain ordinances listed in the Schedules attached to the said Notice. But the Penal Code is not one such ordinance. It is thus abundantly clear that the District African Court of the West Nile has no jurisdiction to have tried and convicted the appellants for an offence contrary to s. 228 of the Penal Code. The trial was a nullity and I do now so declare it. This appeal is allowed. The conviction is quashed and the sentences are set aside.

It is ordered that all the appellants be re-tried by the subordinate court of competent jurisdiction in the District of West Nile, which I understand is the District Court of Arua.

*Appeal allowed. Conviction quashed and sentences set aside. Case remitted for re-trial by a subordinate court.*

The appellants did not appear and were not represented.

For the respondents:

*H Hebron* (State Attorney, Uganda)

For the respondent:

*The Director of Public Prosecutions*, Uganda

**Mistry Amar Singh v Serwano Wofunira Kulubya**  
[1963] 1 EA 408 (PC)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Privy Council   |
| <b>Date of judgment:</b> | 22 July 1963  |
| <b>Case Number:</b>      | 33/1961   |
| <b>Before:</b>           | Viscount Radcliffe, Lord Morris of Borth-y-Gest, Lord Guest,<br>Lord Pearce and Sir Kenneth Gresson |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | E.A.C.A. Civil Appeal No. 74 of 1960 on appeal from High<br>Court of Uganda – Lyon, J               |

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*[1] Contract – Illegality – Lease – Mailo land – Lease by African to non-African – Non-African in possession for years – Statutory consents not obtained – Transaction illegal – Whether parties in pari delicto – Recovery of possession – Possession of Land Law (Cap. 25) (Native Laws of Buganda Revised Edition, 1957), s. 2 – Land Transfer Ordinance (Cap. 114), s. 2, s. 3 and s. 4 (1) (U.).*

### **Editor's Summary**

The respondent, an African, was the registered proprietor of three plots of land known as “Mailo” land which he purported by agreements to lease for a year to the appellant, a non-African. The consents of the Lukiko as required by s. 2 (d) of the Possession of Land Law and of the Governor as required by s. 2 of the Land Transfer Ordinance, were not obtained for any of the three transactions. On termination of the tenancies the appellant held over for some years on each of the plots as a tenant from year to year at increased rents.

The respondent then gave notices to quit and sued for possession of the plots and eviction of the appellant therefrom, basing his claim first upon the agreements to lease but finally in his reply upon his registered ownership of the plots and independently of the agreements to lease. It was common ground that the respondent in permitting the appellant to lease, occupy and use his mailo land without the approval of the Lukiko was acting in contravention of the law and was committing an offence. Similarly the appellant also acted in contravention of the law in contracting to take the plots on lease and in occupying them without the approval of the Governor. The trial judge dismissed the suit on the ground that both the parties were in *pari delicto* and that as a result the respondent was not entitled to recover possession of the plots. On appeal by the respondent the Court of Appeal allowed the appeal and decreed that the appellant be evicted from the plots and give possession to the respondent. On appeal to the Privy Council.

**Held –**

- (i) the appellant, as a non-African, had no right without the consent in writing of the Governor to occupy or enter into possession of the land or to make any contract to take the land on lease and as the agreements were unlawful no leasehold interest vested in the appellant.
- (ii) the respondent's right to possession was in no way based upon the purported agreements and he required no aid from the illegal transactions in order to establish his case; although the respondent had offended by being a party to the illegal and ineffective agreements, considerations of public policy did not demand the failure of his claim for possession; on the contrary such considerations pointed to the necessity of upholding it in order to eject a non-African who was in unlawful occupation.
- (iii) the respondent was neither obliged to found his claim on the illegal agreements into which he had entered nor in order to support his claim to plead or to depend upon the agreements, and accordingly he was not in *pari delicto* with the appellant but was a member of a protected class.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Simpson v. Bloss* (1816), 7 Taunt. 246; 129 E.R. 99.
- (2) *Bowmakers Ltd. v. Barnet Instruments Ltd.*, [1945] 1 K.B. 65; [1944] 2 All E.R. 579.
- (3) *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724.
- (4) *Taylor v. Chester* (1869), L.R. 4 Q.B. 309.
- (5) *Motibai Manji v. Khursid Begum*, [1957] E.A. 101 (C.A.).
- (6) *Browning v. Morris* (1778), 2 Cowp. 790; 98 E.R. 1364.
- (7) *Kearley v. Thomson* (1890), 24 Q.B.D. 742.

**Judgment**

**Lord Morris of Borth-y-Gest:** This is an appeal by final leave from a judgment and order of the East African Court of Appeal (The Honourable Sir Alastair Forbes, V.P., The Honourable Mr. Justice

Crawshaw, J.A., and The Honourable Sir Owen Corrie, Ag. J.A.) dated January 25, 1961, allowing the appeal of the respondent (whom their lordships will refer to as the plaintiff) from a judgment and decree of Her Majesty's High Court of Uganda at Kampala (The Honourable Mr. Justice Lyon) dated July 5, 1961. The issue which arises in the litigation is whether the plaintiff could by legal proceedings recover certain land from the appellant (whom their lordships will refer to as the defendant) although the plaintiff had put the defendant into possession of the land and allowed him for some years to remain

in possession of it following upon certain purported leases which were entered into in contravention of statutory enactments.

The plaintiff is an African. At all material times he was the registered proprietor of certain land of the class of land known as "Mailo" land. The land which is in question consists of three plots situate near to Nakivubo being plots "H", "S" and "T" forming part of land comprised in Mailo Register, vol. 750, folio 12. The defendant is an Indian who resides at Nakivubo.

Certain statutory provisions call for mention. The Possession of Land Law (Cap. 25 of the 1957 Revised Edition of the Native Laws of Buganda) contains in para. (d) and para. (k) of s. 2 the following words (omitting such as are not for present purposes relevant):

"2 (d) The owner of a mailo shall not permit one who is not of the Protectorate to lease, occupy or use his mailo except with the approval in writing of the Governor and the Lukiko:

.....

"(k) The owner of a mailo who contravenes any provision of para.

(c) or para. (d) of this section shall be liable on conviction to a fine not exceeding Shs. 500/- or to imprisonment not exceeding six months or to both such fine and imprisonment."

Section 2, s. 3 and s. 4 (i) of the Land Transfer Ordinance (Cap. 114 of the 1951 Edition of the Laws of Uganda) omitting the provisos to s. 2 which are not relevant to this case read as follows:

- "2. No non-African or any person acting as his agent shall without the consent in writing of the Governor occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the Governor) or make any contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or of any interest therein other than a security for money: . . .
- "3. The Governor may refuse the consent mentioned in s. 2 of this Ordinance without assigning any reason or may specify terms upon which such consent is conditional.
- "4. (1) Any person who commits a breach of the provisions of this Ordinance or of any terms imposed by the Governor under s. 3 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Shs. 2,000/- or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment."

The plaintiff purported to lease plot "T" to the defendant for one year on November 1, 1946, at a rent of Shs. 300/- per annum the payment to be in advance. The plaintiff allowed the defendant to enter into possession and thereafter (though after the first year at a rent increased to Shs. 350/- per annum) the defendant remained in possession. The approval of the Governor and the Lukiko was not then or at any time obtained. It follows that the plaintiff in permitting the defendant to lease, occupy and use his mailo was acting in contravention of the law and was committing an offence. The defendant was also acting in contravention of the law: he was committing an offence when he occupied and entered into possession of the land and when he made a contract to take the land on lease.

Plot "H" was leased by the plaintiff to the defendant in 1946, and plot "S" in 1947, the former at a rent of Shs. 300/- per annum payable in advance and



yearly and the latter at a rent of Shs. 240/- per annum payable in advance and thereafter yearly. None of the tenancies was registered.

In no case was the consent of the Governor and Lukiko obtained though consent was later sought. The case was fought in the High Court on an agreed statement of facts which included the following:

“Consent of Governor and Lukiko never obtained although it was sought after the agreements. Lukiko refused 12.11.49. Notice to quit served on defendant on 13.11.59 for the 31st day of December, 1959, for each of the plots. Rent was paid to the plaintiff up to and including 31.12.59 for each of the plots. The defendant entered into occupation of the three plots in 1946 and 1947, and has remained in occupation contrary to s. 2 of the Land Transfer Ordinance.”

By his amended plaint (which was dated April 26, 1960), the plaintiff set out that he is an African landowner and the registered proprietor of the three plots and that the defendant is an Indian. Having set out the agreements his claims at that time were:

- “(a) Possession of the said land and eviction of the defendant therefrom;
- (b) Mesne profits from the 1st day of January, 1959, at the rate of Shs. 890/- per annum until possession is granted;
- (c) An injunction perpetually restraining the defendant from trespassing on the said land;
- (d) Costs;
- (e) Damages;
- (f) Further or other relief.”

Having regard to the contention mainly relied upon by the defendant at the trial it becomes necessary to refer to those paragraphs of the plaint which were relevant to the defendant’s contention. They are as follows:

- “3. By an agreement made the 21st day of November, 1946, the plaintiff leased to the defendant Plot No. ‘T’ being part of the land comprised in Mailo Register, vol. 750, folio 12, for one year from the 1st day of November, 1946, at a rent of shillings three hundred (Shs. 300/-) such rent being payable in advance (such lease to be renewable from year to year).
- “4. By an agreement made the 29th day of March, 1946, the plaintiff leased to the defendant plot No. ‘H’ being part of the land comprised in Mailo Register, vol. 750, folio 12, for one year from the 1st day of March, 1946, at a rent of shillings three hundred (Shs. 300/-) such rent being payable in advance (such lease to be renewable from year to year).
- “5. By an agreement made the 1st day of October, 1947, the plaintiff leased to the defendant Plot No. ‘S’ being part of the land comprised in Mailo Register, vol. 750, folio 12, for one year from the 1st day of September, 1947, at a rent of shillings two hundred and forty (Shs. 240/-) such rent being payable in advance.
- “6. On the termination of the tenancies above referred to the defendant held over on each of them as a tenant from year to year at an increased rent of shillings three hundred and fifty (Shs. 350/-) in respect of the said plot ‘T’ and shillings three hundred and shillings two hundred and forty (Shs. 300/- and Shs. 240/-) respectively in respect of plots ‘S’ and ‘H’ in accordance with cl. 5 of each of the tenancy agreements above referred to.
- “7. The consents necessary to any of the above leases were not obtained.

- “8. On the 12th day of November, 1959, notice to quit the said plots ‘S’, ‘T’ and ‘H’ was given to the defendant, such notice to be effective on the 1st day of January, 1960. Copies of such notices were annexed to the original plaint herein and marked ‘A’.
- “9. The defendant has neither paid nor tendered any rent in respect of the said land subsequent to the 31st day of December, 1958, and remains illegally in occupation of the land.”

In his statement of defence the defendant pleaded as follows:

“In the alternative, the defendant states that the plaintiff was party to illegal agreements. The said agreements are referred to in paras. 3, 4 and 5 of the plaint. Therefore the plaintiff is not entitled to file any action on the said agreements.”

The relevant paragraphs of the reply of the plaintiff are as follows:

- “2. The plaintiff agrees that the agreements referred to in paras. 3, 4 and 5 of the plaint were illegal without consents of the Governor and the Lukiko and admits that such consents have not been given.
- “3. The plaintiff asserts that the defendant has at all material times occupied, and still occupies, the land referred to in the said agreements illegally.
- .....
- “5. The plaintiff abandons his claim for rent, mesne profits and damages.”

At the hearing certain issues were framed and agreed by learned counsel viz.

- “1. Are the parties not in *pari delicto* being each in turn guilty of an offence in permitting and taking a lease?
- “2. If yes, can the plaintiff recover possession on the strength of the illegality of the lease to which he was a party?
- “3. Has any possession or property been transferred by the illegal agreements?
- “4. Having pleaded illegality in order to support his claim and seeking to found his claim on the illegal contracts, can the plaintiff recover possession or obtain an injunction to restrain the alleged trespass?”

The learned judge dismissed the plaintiff’s claim. He based his decision on the ground that both parties were in *pari delicto* and that as a result the plaintiff could not recover. He said:

“Both parties knew all their transactions were illegal, both of them knew that consent, the necessary consents, had been refused, yet the plaintiff allowed the defendant to occupy the plots in dispute for over thirteen years, and accepted rent for many years, and now seeks an order for eviction in circumstances where even if the so-called lease were valid no proper notice to quit has been given. The plaintiff’s claim has no merit; and I am surprised that the court was ever troubled with it. All the transactions were illegal, and certainly the plaintiff does not come to this court with clean hands.”

Answering the question raised by the first issue in the affirmative he answered the questions raised by the remaining three issues in the negative.

On appeal by the plaintiff to the Court of Appeal the appeal was allowed and a decree was made which provided that the defendant should be evicted from the lands and should grant possession to the plaintiff. In the judgments

it was pointed out (rightly as their lordships think) that a rejection of the plaintiff's claim would have the result that the defendant, a non-African, would be entitled to remain permanently in possession of African land, to the exclusion of the registered African owner, and without payment of any nature whatsoever.

Although as has been seen, the plaintiff set out in his plea that he had entered into agreements to lease the plots of land to the defendant his right to claim possession did not depend upon those agreements. His claim was in the end based independently of those agreements. Though the plaintiff did in his plea claim mesne profits and damages he later abandoned those claims and at the trial he made no claim for rent or for mesne profits. He was able to rest his claim upon his registered ownership of the property. The defendant did not have and could not show any right to the property. In view of the terms of the legislative provisions he could not assert that he had acquired any leasehold interest. For the same reason the defendant could not assert that he had any right to occupy. As a non-African he had no right without the consent in writing of the Governor to occupy or enter into possession of the land or to make any contract to take the land on lease. Quite irrespective of the circumstance that the plaintiff by giving certain notices to quit had purported to withdraw any permission to occupy the defendant was not and never had been in lawful occupation.

The defendant for his part could not point to or rely upon the illegal agreements as justifying any right or claim to remain in possession and without doing so he could not defeat the plaintiff's claim to possession. In so far as the plaintiff may have thought that in the circumstances it was reasonable to give the defendant notices to quit he could give such notices without their being related to or dependent upon the unlawful agreements. Because the agreements were unlawful no leasehold interest vested in the defendant. He had no right to hold over or to hold from year to year. His occupation of the land was contrary to law.

Their lordships consider therefore that the plaintiff's right to possession was in no way based upon the purported agreements. It was the defendant who might have needed to rely upon them because had they been valid and permissible agreements the defendant would have contended that the tenancies would have needed for their termination longer periods of notice than those contained in the notices to quit that were given. As it was, the contention of the defendant (based on paragraph 3 of the defence) was that the plaintiff was disabled from suing because he had been a party to illegal agreements. It was quite correct as set out in that paragraph of the defence that the plaintiff had been a party to illegal agreements. At the time of the trial however he was not basing his claim "on the said agreements". Indeed he could have presented his claim (if it were limited to a claim for possession) without being under any necessity of setting out the unlawful agreements in his plea. He required no aid from the illegal transactions in order to establish his case. (Compare *Simpson v. Bloss* (1) (1816), 7 Taunt. 246.) It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant who was a non-African was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. It is true that the plaintiff referred to the purported agreements to which he had been a party and that he repudiated them and acknowledged that they were illegal. It was however in spite of and not because of those illegal agreements that he was entitled to possession. Though the plaintiff had offended by being a party to the illegal and ineffective agreements their lordships do not consider that considerations of public policy demanded the failure of his claim for possession: on the contrary such considerations pointed to the necessity of upholding it in order to eject a

non-African who was in unlawful occupation. Their lordships agree with Forbes, V.P.,

“that it would be contrary to public policy for the courts to refuse to assist an African to eject a non-African in illegal occupation of the former’s land, even though the African may have committed an illegal act in permitting the non-African to enter on the land”.

This their lordships consider is in line with the decision of the Court of Appeal in *Bowmakers Ltd. v. Barnet Instruments Ltd.* (2), [1945] 1 K.B. 65, in which case Du Parcq, L.J., delivering the judgment of the court said (at p. 70):

“*Prima facie*, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man’s goods have got into another’s possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority.”

In his judgment in *Scott v. Brown, Doering, McNab & Co.* (3), [1892] 2 Q.B. 724, Lindley, L.J., at p. 728, thus expressed a well-established principle of law:

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indicable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

Lindley, L.J., added at p. 729:

“Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced.”

A. L. Smith, L.J. at p. 734, said:

“If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action.”

In the earlier case of *Taylor v. Chester* (4) (1869), L.R. 4 Q.B. 309, it was said at p. 314:

“The true test for determining whether or not the plaintiff and the defendant were in *pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.”

In that case it became impossible for the plaintiff to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. He was therefore defeated by the principle which is expressed in the maxim “*in pari delicto potior est conditio possidentis*”. That was a case therefore where a plaintiff was forced, in order to support his claim, to plead the illegality of a contract. The case was referred to in the judgment of the Court of Appeal in *Bowmakers Ltd. v. Barnet Instruments Ltd* (2). At p. 71 it was said:

“In our opinion, a man’s right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant’s possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.”

For these reasons their lordships consider that the plaintiff was neither obliged to found his claim on the illegal agreements into which he entered nor, in order to support his claim, to plead or to depend upon the agreements. He was not therefore “in pari delicto” with the defendant.

This conclusion is reinforced when the scope and purpose of the legislative provisions are considered. Their lordships agree with the view expressed in the Court of Appeal that the legislation was intended to be for the benefit of Africans as a class. In a case in 1957 the Court of Appeal for Eastern Africa recognised that the object of the Land Transfer Ordinance is to protect Africans by regulating any transfer of mailo land and by controlling (as a matter of public policy) the sale of mailo land to non-Africans. (*See Motibai Manji v. Khursid Begum* (5), [1957] E.A. 101 (C.A.). Section 2 of the Land Transfer Ordinance positively prohibits occupation by a non-African unless the consent in writing of the Governor has been given. A non-African who commits a breach of the provisions of the Ordinance becomes guilty of an offence. The circumstance that under the Possession of Land Law an owner of “mailo” land also commits an offence if, without the approval in writing of the Governor and the Lukiko, he permits “one who is not of the Protectorate” to lease, occupy or use such land does not alter the fact that the purpose of the legislation is to protect Africans and to preserve African land for use by Africans. In this case the plaintiff in spite of what was set out in his pleadings and in spite of the claims which the pleadings at first contained did not at the trial in any way rely upon or seek to enforce the unlawful agreements though he had himself made it known that he had entered into them. That, however, did not make him “in pari delicto” with the defendant. He was a member of the protected class.

In his judgment in *Browning v. Morris* (6) (1778), 2 Cowp, 790, Lord Mansfield, said:

“But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of those statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.”

So in *Kearley v. Thomson* (7) (1890), 24 Q.B.D. 742, Fry, L.J., at p. 745, referred to the case of oppressor and oppressed

“... in which case usually the oppressed party may recover the money back from the oppressor. In that class the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from

the other, notwithstanding that both have been parties to the illegal contract”.

Their lordships agree with the conclusions which were reached in the Court of Appeal and accordingly will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

*Appeal dismissed.*

For the appellant:

*JG Baker* (of the English Bar)

*Goodman, Derrick & Co*, London

For the respondent:

*C Slade* (of the English Bar)

*Hugh V Harraway & Son*, London

## **Latif Suleman Mohamed v K J Pandya and others** [1963] 1 EA 416 (CAN)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Nairobi                                    |
| <b>Date of judgment:</b> | 5 June 1963   |
| <b>Case Number:</b>      | 56/1962   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | H.M. Supreme Court of Kenya – Rudd, Ag. C.J                   |

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*[1] Will – Survivor – Life interest to wife and daughter – Gift over to four sons “or survivors or survivor of them” – Death of one son before daughter – Death of another son before mother – When gift vests in legatees – Proportion to which each legatee entitled – Indian Succession Act, 1865, s. 106 and s. 112.*

*[2] Costs – Probate and administration – Construction of will – Appeal by executor – Whether executor liable to pay costs of appeal personally.*

### **Editor’s Summary**

M. died leaving a will in which he bequeathed two leasehold plots to his trustees upon trust to pay the net rents and profits of one plot No. 734/1 to his widow and of the other No. 734/2 to his daughter during their respective lives. After their respective deaths the plots were to go to the four sons, namely, Suleman, Hussein, Hassam and Ali, “or the survivors or survivor of them, if more than one in equal

shares”, and the four sons, with a similar provision as to survivorship, were made the residuary legatees. All the beneficiaries survived the testator but, on the death of the daughter, three sons, namely, Suleman, Hussein and Hassam were living, and, on the death of the mother, two sons were living, namely, Suleman and Hassam. The executor took out an originating summons for determination of the questions who was entitled, and to what shares, to the two plots, and how the property of the deceased should be divided. The trial judge ruled that the reference to survivors or survivor in the bequests of the remainders could be construed as relating to the death of the testator and that the remainders vested on the death of the testator in favour of his surviving sons to take effect on the death of the life tenants. On appeal against this ruling, which would have resulted in the leasehold plots going as to one-fourth to the surviving son, Hassam, and one-fourth to each of the families of the other three sons, it was contended for the appellant, a son of Suleman, that only the three sons who were living at the date of the death of the daughter were entitled to share in plot No. 734/2 and similarly, only the two sons who survived the widow were entitled to plot No. 734/1. There was also a cross-appeal by the executor against the order of costs made by the trial judge in which he had allowed three sets of costs to the members of the family of Suleman.

**Held –**

- (i) the gifts to the sons or the survivors or survivor of them in the will were directed to take effect “after the death” of the widow and daughter

respectively, and those dates governed the time of distribution; accordingly, Suleman, Hussein and Hassam were entitled to share in plot No. 734/2 and Suleman and Hassam in plot No. 734/1.

- (ii) s. 106 of the Indian Succession Act, 1865, was not applicable as the gift was to the sons or the survivors or survivor, and thus expressed a contrary intention and brought the case within s. 112 of the Act.
- (iii) in the circumstances the trial judge had not exercised his discretion wrongly in allowing three sets of costs and accordingly the cross-appeal must be dismissed.
- (iv) a trustee who appeals to the Court of Appeal in England does so usually at his own risk as to costs; accordingly there should be no order for costs of the executor on the cross-appeal.

Appeal allowed. Cross-appeal dismissed.

#### **Cases referred to in judgment:**

- (1) *Re Douglas's Will Trusts*, [1959] 2 All E.R. 620.
- (2) *Haig v. Swiney* (1823), 1 Sim. & St. 487; 57 E.R. 193.
- (3) *Cripps v. Wolcott* (1819), 4 Madd. 11; 56 E.R. 613.
- (4) *Hearn v. Baker* (1856), 2 K. & J. 383; 69 E.R. 831.
- (5) *Re Stuart, Johnson v. Williams*, [1940] 4 All E.R. 80.
- (6) *Re Gillson (deceased), Ellis v. Leader*, [1948] 2 All E.R. 990.
- (7) *Re Earl of Radnor's Will Trusts* (1890), 45 Ch. D. 402.

June 5. The following judgments were read:

#### **Judgment**

**Sir Trevor Gould Ag V-P:** Memon Mohamed Moti (hereinafter called the testator) made his last will on July 17, 1930, and died a few days thereafter. He left surviving him his widow Jijabai, his daughter Rabia and four sons, whom I will designate by their first names Suleman, Hussein, Hassam and Ali. He bequeathed two leasehold plots in Nairobi (Plots 734/1 and 734/2) to his trustees upon trust to pay the outgoings thereof from the rents and profits and upon further trust to pay the rents and profits of Plot 734/1 to Jijabai during her life and those of Plot 734/2 to Rabia during her life. After their respective deaths the plots were to go to the four "or the survivor or survivors of them, if more than one in equal shares" and the four sons, with a similar provision as to survivorship, were made residuary legatees.

All the beneficiaries I have mentioned survived the testator. Of the two ladies Rabia died first but one of the sons, namely Ali, predeceased her. Next the son Hussein died and then Jijabai; Suleman died thereafter and Hassam is still living. All of the deceased sons left families surviving them. Thus, at the death of Rabia, Suleman, Hussein and Hassam were living, and at the death of Jijabai, only Suleman and Hassam were living.

Kameshwar Juthalal Pandya (hereinafter called "the executor") took out an originating summons in the Supreme Court of Kenya on January 20, 1958, for the determination of the questions who is entitled,



and to what shares, to the two plots, and how the property of the deceased should be divided. The executor is in fact the surviving executor and trustee. Rather protracted litigation followed

and a number of questions concerning the will were debated, but it has not been challenged upon this appeal by any party that the rights of the various beneficiaries depend entirely upon the true construction of the testator's will.

The finding of the learned judge in the Supreme Court on this matter is contained in the following ruling:

"This is not a very well drafted will. If the reference to survivor or survivors were used only in the bequests of the remainder I would have held it applied to survivorship as at the time of the death of the life tenant. But the same words are used in the bequest of the residuary estate and there clearly refer to surviving the testator.

"The court will lean in favour of vesting if there is no clear indication to the contrary. In view of the terms of the residuary bequest I think that the reference to survivor or survivors in the bequests of the remainders can be construed as relating to the death of the testator and in consequence that the remainders vested in the death of the testator in favour of his surviving sons to take effect on the death of the life tenants."

This ruling, which would result in the leasehold plots going as to one-fourth to the surviving son Hassam and one-fourth to each of the families of Suleman, Hussein and Ali has been attacked on this appeal by the appellant Latif Suleman Mohamed, a son of Suleman, and it has been contended that only those sons who were living at the date of the death of Rabia were entitled to share in Plot 734/2, and similarly, only the two who survived Jijabai were entitled to Plot 734/1. The family of Ali would, as a result, be excluded entirely, and the entitlements of the others would be to some extent varied.

The will, after the bequest of the two leasehold plots to the trustees reads, so far as it is relevant:

"Upon trust that my trustees shall be and out of the rents and profits thereof pay the respective rents reserved by the said respective leases and all other necessary outgoings in respect thereof and the expenses of keeping the buildings erected on the said two plots of land insured and in good repair and otherwise performing the covenants of the said respective leases and upon further trust that my trustees shall pay the net rents and profits of the said plot No. 734/1 to my wife Jijabai during her life and the net rents and profits of the said plot No. 734/2 to my daughter Rabia, widow of Saleh Mohamed during her life and after the death of my said wife to stand possessed of the said plot No. 734/1 in trust for my four sons the said Suleman Mohamed, Hussein Mohamed and Hassam Mohamed and the said Ali Mohamed or the survivors or survivor of them, if more than in equal shares and after the death of my said daughter Rabia to stand possessed of the said Plot No. 734/2 in trust for my said four sons or the survivors or survivor of them, if more than one in equal shares I devise and bequeath all the residue of my estate and effects whatsoever and wheresoever both real and personal to which I may be entitled or which I may have power to dispose of at my decease including my one-fifth share and interest as senior partner in the firm of Mohamed Moti & Sons unto and to the use of my said four sons or the survivors or survivor of them, their respective heirs executors and administrators absolutely if more than one in equal shares . . ."

It was common ground between counsel that the use of the word "of" in two places in that passage, preceding the phrases "the survivors" is a manifest error and that there is no alternative but to read it as "or": also that the word "one" must be read into the text before "in equal shares" in the gift over of Plot 734/1. I agree.

Under English law the authorities governing this question are clear. The position is set out in Halsbury's Laws Of England (3rd Edn.), Vol. 39, pp. 1047 – 1048, para. 1569, which reads:

“1569. Ascertainment of Survivors at Date of Distribution. In cases where there is a gift to a number of persons and the survivors or survivor of them, or with benefit of survivorship, or in like words, or where there is a postponed gift to persons ‘surviving’, the survivorship is, in default of any expressed intention of the testator, *prima facie* referred to the period of distribution. Thus, the time in question, where the gift is immediate, is the death of the testator, and where the gift is postponed to a life estate, is the death of the tenant for life or death of the testator, whichever last happens; and this applies whether the gift is of real or of personal estate.”

The court was referred to *Re Douglas's Will Trusts* (1), [1959] 2 All E.R. 620, in which a testator had given his real estate and the residue of his personal estate to his trustees on trust to pay the income to his widow during her life or so long as she remained his widow, and from and after her death or second marriage he gave his said estate and effects

“to my sisters Jane . . . Elizabeth . . . and Sarah . . . or the survivor or survivors of them”.

The three sisters survived the testator and predeceased the widow. It was held that there was an intestacy as to that part of the estate. It may be noticed in passing that in that case, as in the present one, the gift for life was made through trustees and not directly; that does not appear to affect the position – see *Haig v. Swiney* (2) (1823), 1 Sim. & St. 487; 57 E.R. 193. The learned judge in *Re Douglas's Will Trusts* (1) followed the leading case of *Cripps v. Wolcott* (3) (1819), 4 Madd. 11; 56 E.R. 613, in which the judgment of the Vice Chancellor reads:

“It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division.

“If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer v. Phillips* (1 Eq. Cas. Abr. 292; 21 E.R. 1053).

“But if a previous life-estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy. This is the principle of the cited cases of *Russell v. Long* (4 Ves. 551; 31 E.R. 283), *Daniell v. Daniell* (6 Ves. 297; 31 E.R. 1060), and *Jenour v. Jenour* (10 Ves. 562; 32 E.R. 963).

“In *Bindon v. Lord Suffolk* (1 P. Wms. 96; 1 Bro. Parl. Cas. 189), the House of Lords found a special intent in the will that the division should be suspended until the debts were recovered from the Crown; and they referred the survivorship to that period. The two cases of *Roebuck v. Dean* (2 Ves. 265; 30 E.R. 626) and *Perry v. Woods* (3 Ves. 204; 30 E.R. 970), before Lord Rosslyn, do not square with the other authorities.

“Here, there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous life-estate.

That case seems to me to conclude the matter, provided English law is applicable; the gifts to the sons or the survivor or survivors of them in the will which I am now considering are directed to take effect “after the death” of the widow and daughter respectively, and those dates clearly govern the time for distribution. It can make no difference, as I think was suggested in argument, that the widow and daughter were entitled only to the income of the leaseholds after payment of the expenses and outgoings. That is a perfectly normal provision and can do nothing to accelerate the dates for distribution, which are at the determination of the respective interests of Rabia and Jijabai, whatever they may be. I think with respect that the view of the learned judge that the words of survivorship in relation to the gift over and to the residuary bequest should be taken to refer to the same point of time, is not justified. The provisions in the will as to each gift are distinct and I find nothing in the wording to suggest that the usual construction, which I have referred to above, should not be put upon each.

I did not understand any of the counsel appearing for the respondents to dispute that the position under English law was as I have stated it, but counsel for the executor, and counsel for the third and fourth respondents submitted that the position under the Indian Succession Act, 1865, is different. They relied in particular upon s. 106, which reads:

“106. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator’s death, and shall pass to the legatee’s representatives if he dies before that time and without having received the legacy. And in such cases the legacy is from the testator’s death said to be vested in interest.”

The argument that this section is applicable is, in my opinion, misconceived. It is expressed to be subject to any contrary intention which appears in the will, and, as I see it, merely states the English law. If the gift in the will in the present case had been to the four sons without more, after the life interests, and the sons had survived the testator, this section would have applied and the gift would have vested upon the testator’s death. But the gift was to the sons or the survivor or survivors, which expresses a contrary intention and brings the case within s. 112, which reads:

“112. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution unless a contrary intention appear by the will.”

The illustrations to this section make it abundantly clear that it is designed to bring in the rule in *Cripps v. Wolcott* (3) which is cited among the illustrations to the section in The Indian Succession Act by Majumdar (1924), as is *Hearn v. Baker* (4) (1856), 2 K. & J. 383; 69 E.R. 831, which followed the decision in *Cripps v. Wolcott* (3) and is indistinguishable in its circumstances from those of the present case.

Mr. J. J. Patel, for the fourth respondent, drew the court’s attention to passages in Hindu Law by Mulla (11th Edn.), pp. 475 – 476, concerning the interpretation of wills of Hindus. In particular he referred to the surrounding circumstances, which might include the ignorance of a native testator of proper legal phrases to express his intention. That argument, however, can carry no weight here, where the will appears to have been drawn (however badly) in an advocate’s office and was witnessed by his clerk. The phraseology is clearly that common in English wills. The textbook, moreover, states the basic principle

that the words of the will are the primary guide, and s. 112 of the Act makes it clear how the words used in the present case are to be interpreted.

For those reasons, though with some reluctance, I would allow the appeal and hold that Hassam, the legal representative of the estate of Suleman and the legal representative of the estate of Hussein are entitled to equal shares in the leasehold of Plot 734/2, and that Hassam and the legal representative of the estate of Suleman are entitled to share leasehold Plot 734/1 equally between them. Accumulated income of the leaseholds other than that apportioned to the life tenants' estates would be divisible in the same way. I would direct that the order of the learned judge be amended accordingly.

There remains the question of costs. The court was referred to *Re Stuart, Johnson v. Williams* (5), [1940] 4 All E.R. 80, and *Re Gillson (deceased), Ellis v. Leader* (6), [1948] 2 All E.R. 990, on the question of costs in the Court of Appeal in cases relating to construction of wills. Before this court appeared Mr. D. N. Khanna (with him Mr. Winayak) for the appellant, who is a member of Suleman's family, Mr. Trivedi for the executor (trustee), Mr. V. V. Patel for the surviving son Hassam, Mr. Bhailal Patel for the representative of the estate of Hussein, Mr. J. J. Patel for the representative of the estate of Ali, and Mr. Nene for another son of Suleman. The appeal was contested by Mr. Bhailal Patel and Mr. J. J. Patel whose clients would both suffer if the appeal succeeded. Mr. V. V. Patel and Mr. Nene, whose clients would profit by the success of the appeal, contributed nothing of value to the argument; their interests were at one with that of the appellant. Applying, as well as I may, the principles that govern such cases, I would order that the appellant's taxed costs be paid from the estate (but not certified for two counsel), that the costs of the executor (trustee) be taxed and paid from the estate, and that the third and fourth respondents should have between them one set of taxed costs from the estate. I would make no order for the costs of any other party.

It is now necessary to proceed to the consideration of a cross-appeal which was lodged by the executor and which was argued separately. At the outset the advocates for the second, third, fourth and sixth respondents, who had been served with notices, stated that they had no interest in the cross-appeal and sought leave to withdraw. The fifth respondent was present in person.

The subject-matter of complaint was the order for costs made in the court below, which was –

- “(vii) that each party, except Abdul Ghani, should have his costs out of the estate on the higher scale; that includes the executor;
- (viii) that certificate of one set of costs for two counsel is granted in respect of Hazrabai widow of Suleman Mohamed Moti and Latif Suleman Mohamed.”

It will be observed that Latif Suleman Mohamed, the present appellant, and the widow of Suleman were granted one set of costs between them. The executor was given his costs as were the other parties, except Abdul Ghani, with whom the court is not now concerned. The complaint of the executor on the cross-appeal is that in the result three sets of costs went to members of the family of Suleman, as, in addition to Latif and Hazrabai, Wali Mohamed Suleman and Abdul Sattar (both sons of Suleman) were made or became parties and received costs. It was the executor's contention that only one set of costs should have been allotted to each of the four branches of the family.

Beyond a reference to the cases of *Re Stuart, Johnson v. Williams* (5) and *Re Gillson (deceased), Ellis v. Leader* (6) the advocate for the appellant had little to support his contention that the learned judge had exercised his discretion as to costs wrongly. So far as I can ascertain from the record no direction of the

court was sought to obtain proper representation of the estate of Suleman and no letters of administration had been obtained by any of the family at the date of the hearing in the Supreme Court. That three sons, none of whom could legally represent the family, should have been made parties, seems on the face of it undesirable, but that was done, it seems, without objection. A number of matters were dealt with in the Supreme Court, in addition to the question argued on appeal, and the attention of this court has not been drawn to any portions of the record indicating whether separate representation was wasteful or not. It is, however, recorded that the advocate for the executor suggested that costs should come out of the estate "except Jaswant Singh's client" who, I understand, was Abdul Ghani. Mr Trivedi, for the executor, has said in this court that he did not mean individual costs for all parties, but if so, he failed to make himself clear and may well have misled the judge. There was certainly no submission that costs should be allotted on the basis of families. The Presumption is that the learned judge exercised his discretion correctly until the contrary is shown. That he had in mind the correct principle that unnecessary duplication of costs is to be avoided, is indicated by his order for one set of costs for Latif and Hazrabai. In these circumstances, in my opinion, his order has not been shown to be a wrong exercise of discretion and the cross-appeal fails and must be dismissed. I should add that Mr. Khanna raised procedural objections to the cross-appeal which I do not now need to consider.

As to the costs of the cross-appeal it has been held that a trustee who appeals to the Court of Appeal does so usually at his own risk as to costs – *Re Earl of Radnor's Will Trusts* (7) (1890), 45 Ch. D. 402, where it is indicated that the trustee being unsuccessful will be ordered to pay the costs personally. It is difficult to understand in the present case why the executor departed from a position of neutrality in respect of the costs order and *prima facie* he should bear the costs of the cross-appeal. Mr. Trivedi, however, who appeared for the executor made a statement from the bar that he had the concurrence of all parties other than the Suleman family in taking the action he did. If that is the case the advocates concerned should have so stated before withdrawing, and Mr. Trivedi would have been wise to have obtained an indemnity as to costs from them. Nevertheless I feel that the statement from the bar should be accepted and the executor not made personally liable for the costs of the respondent on the cross-appeal. I would order that the taxed costs of the respondent on the cross-appeal (that is Latif Suleman Mohamed) be paid from the estate, that there be no order for costs of the executor on the cross-appeal, and that there be no order for the costs of any of the other parties.

**Sir Ronald Sinclair P:** I agree and have nothing to add. The appeal is accordingly allowed and the order of the learned judge in the Supreme Court will be amended as suggested by the learned Acting Vice-President; the cross-appeal is dismissed. There will also be the orders as to costs on the appeal and cross-appeal suggested in his judgment.

**Newbold JA:** I also agree.

*Appeal allowed. Cross-appeal dismissed.*

For the appellant:

*DN Khanna and JK Winayak*

*Winayak & Johar & Co, Nairobi*

For the first respondent:

*HD Trivedi*

*Trivedi & Sons, Nairobi*

For the second respondent:

*VV Patel*

*VV Patel*, Nairobi

For the third respondent:

*Bhailal Patel*

*Bhailal Patel*, Nairobi

For the fourth respondent:

*JJ Patel*

*JJ and VM Patel*, Nairobi

The fifth respondent did not appear and was not represented.

For the sixth respondent:

*DN Nene*

*DN Nene*, Nairobi

**Sarwan Singh v Karam Singh Lal Puran Singh**  
[1963] 1 EA 423 (SCK)

|                          |                                     |
|--------------------------|-------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nakuru |
| <b>Date of judgment:</b> | 19 June 1963                        |
| <b>Case Number:</b>      | 170/1961                            |
| <b>Before:</b>           | Miles J                             |
| <b>Sourced by:</b>       | LawAfrica                           |

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*[1] Practice – Parties – Joinder – Action for arrears of salary – Salary due from a firm – Action brought against one partner only – Whether other partner should be joined as co-defendant – Civil Procedure Ordinance, s. 97 (K.) – Partnership Ordinance (Cap. 29), s. 11 (K.) – Indian Contract Act, 1872, s. 43 – Partnership Act, 1890 (U.K.) – Kenya Order-in-Council, 1921, art. 4 (2).*

**Editor's Summary**

The plaintiff sued the defendant for arrears of salary alleged to be owing by a firm of which the defendant and another person were the partners. The defendant sought a stay of proceedings until the plaintiff should amend the summons and plaint by adding the second partner as a co-defendant. It was submitted that under s. 11 of the Partnership Ordinance the plaintiff should have joined the second partner as a co-defendant and for the plaintiff it was contended that this was not necessary as the position in Kenya was governed by s. 43 of the Indian Contract Act, 1872.

**Held –**

- (i) there is no inconsistency or conflict between s. 11 of the Partnership Ordinance and s. 43 of the Indian Contract Act, 1872, as the two enactments deal with entirely different matters and are complementary.
- (ii) section 11 of the Partnership Ordinance deals with the relationship of the partners inter se and as between themselves and creditors, and provides that the legal relationship is of joint liability, while s. 43 of the Indian Contract Act deals with the legal consequences of such a relationship and the question who can or need be sued.
- (iii) there is no obligation in Kenya for a plaintiff who seeks to enforce a claim against a partnership to join all the partners as defendants.

Application dismissed.

**Cases referred to in judgment:**

- (1) *Norbury Natzio & Co. Ltd. v. Griffiths*, [1918] 2 K.B. 369; [1918 – 19] All E.R. Rep. 225.
- (2) *R. v. Minister of Health, Ex parte Villiers*, [1936] 1 All E.R. 817.
- (3) *North Level Comrs. v. River Welland Catchment Board*, [1937] 4 All E.R. 684.
- (4) *Bishop of Gloucester v. Cunningham*, [1943] 1 All E.R. 61.
- (5) *Hall v. Arnold*, [1950] 1 All E.R. 993.

**Judgment**

**Miles J:** This is a motion by the defendant that all further proceedings be stayed until the plaintiff amends the summons and the plaint by adding one Dharam Singh s/o Puran Singh as co-defendant. It is brought under s. 97 of the Civil Procedure Ordinance.

The action is brought by the plaintiff for arrears of salary. At the material time the defendant and Dharam Singh were carrying on business in partnership under the name of “Nakuru Motor Garage”.



Mr. Khanna, for the defendant, bases his argument primarily on s. 11 of the Partnership Ordinance (Cap. 29, Laws of Kenya) – which provides, so far as material:

“Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner.”

He contends that the English Rule of procedure applies. It is conceded that if the English Rule does apply this application must succeed, since under English law a defendant has a *prima facie* right to have his joint co-contractor named as a defendant unless special circumstances show that he should not be (see *Norbury Natzio & Co. Ltd. v. Griffiths* (1), [1918] 2 K.B. 369).

Mr. Rawlins, for the plaintiff, contends that the position in Kenya is governed by s.43 of the Indian Contract Act which is in the following terms:

“When two or more persons make a joint promise, the promise may in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.”

The commentary to this section states in T. Q. Desai’s Indian Contract Act – (14th Edn.), at p. 178:

“This section, as already pointed out is one of the series of ss. 42 – 45 materially altering the Rule of English Common Law as to the devolution of the benefit of and liability in respect of joint contracts. The English rule that all joint contractors must be sued jointly for breach of contract is clearly departed from in this section which lays down that the promise can compel any one of the joint promisors to perform the promise. The section has been applied to joint promisors such as mortgagors, joint tenants, partners, persons jointly passing a promissory note and others. It is not incumbent on the promisee in such a case to make all the joint promisors party defendants to the suit.”

Mr. Khanna argues that in so far as there is a conflict between s. 11 of the Partnership Ordinance and s. 43 of the Indian Contract Act, the former must prevail as being the later enactment and also as being a special enactment dealing with partnerships.

The question of conflicts between special and general enactments has been dealt with in a number of cases. The difficulties usually arise where the general enactment is later in time. In such cases the maxim “*generalalia specialibus non derogant*” applies: (see for instance *R. v. Minister of Health, Ex parte Villiers* (2), [1936] 1 All E.R. 817; *North Level Comrs. v. River Welland Catchment Board* (3), [1937] 4 All E.R. 684; *Bishop of Gloucester v. Cunningham* (4), [1943] 1 All E.R. 61 and *Hall v. Arnold* (5), [1950] 1 All E.R. 993).

The position where the special enactment is later than the general one is stated in Halsbury’s Laws of England (3rd Edn.), Vol. 36 at p. 468 as follows:

“To the extent that the continued application of a general enactment to a particular case is inconsistent with special provision subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation of the general enactment, or in other words, to repeal the general enactment in relation to that case.”

Mr. Khanna contends, accordingly, that s. 43 of the Indian Contract Act is repealed so far as partnerships are concerned by s. 11 of the Partnership Ordinance.

In my opinion there is no inconsistency whatsoever between the two enactments, which both deal with entirely different matters. Section 11 is concerned with the relationship of the partners inter se and as between themselves and creditors. The section provides that the legal relationship is one of joint liability. Section 43 of the Indian Contract Act on the other hand deals with the legal consequences of such a relationship and the question who can or need be sued. The two sections are not in conflict but are complementary.

Mr. Khanna contends further that so far as the law of partnership is concerned the Partnership Ordinance must be looked at in isolation as constituting a complete codification of the law of partnership, and he says that it is not permissible to consider the Indian Contract Act. He points out that this Ordinance reproduces verbatim the English Partnership Act, and that accordingly the decisions under that Act are binding on the courts of Kenya. I would unhesitatingly agree that in so far as the Partnership Ordinance deals with matters within its purview it is the only relevant enactment. But as I have previously pointed out, the two sections are dealing with different matters. Section 43 of the Indian Contract Act deals with the question who can be sued. This is not provided for either by the Partnership Ordinance nor in England by the Partnership Act but by the Common Law. In Kenya the principles of the Common Law of England apply, under art. 4 (2) of the Kenya Colony Order-in-Council, 1921, only in so far as they are not inconsistent with any applied acts. Section 43 of the Indian Contract Act abrogates the Common Law rules so far as the joinder of the defendants in the case of joint promisors is concerned, and it follows, therefore, that there is no obligation in Kenya for a plaintiff who seeks to enforce a claim against a partnership to join all the partners as defendants. As Mr. Rawlins points out, had he joined Dharam Singh, he would at once be met with the defence that he had been released as appears from the affidavit filed on behalf of the plaintiff. The application, accordingly, fails and is dismissed. I will hear argument as to costs.

*Application dismissed.*

For the plaintiff/respondent:

*CS Rawlins*

*Geoffrey White & Co, Nakuru*

For the defendant/applicant:

*DN Khanna and KM Patel*

*KM Patel, Nakuru*

**Fazal Visram Muman v M R Lalani**  
[1963] 1 EA 425 (HCU)

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|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 30 August 1963                  |
| <b>Case Number:</b>      | 256/1963                        |
| <b>Before:</b>           | Bennett J                       |

*[1] Landlord and tenant – African owner of land – Agreement to sublet by non-African to non-African – Governor's consent necessary – No provision in agreement that subletting subject to Governor's consent – Governor's consent obtained after agreement effective – Whether consent retroactive – Whether agreement void and unenforceable – Land Transfer Ordinance (Cap. 114), s. 2 (U.) – Buganda Land Law, 1908, s. 2.*

### **Editor's Summary**

The plaintiff claimed from the defendant possession of two flats (Nos. 4 and 5), arrears of rent and mesne profits. Neither the plaintiff nor the defendant was an African but the two flats were in a building situated on land of which an African was the registered proprietor. The plaintiff had purported to sublet the flats to the defendant under two distinct agreements, one in respect of each flat, and it was conceded that the sublettings required the consent of the Governor

under s. 2 of the Land Transfer Ordinance. Consent was obtained in respect of one flat (No. 4), only after the agreement had become effective and at the hearing the issue was whether both agreements were void and unenforceable. For the plaintiff it was argued that s. 2 of the Land Transfer Ordinance did not require the Governor's consent to be given before execution of a lease, and that the consent itself in respect of flat No. 4 was expressed to take effect from the date on which the tenant took possession of the premises.

**Held –**

- (i) the agreement to sublet flat No. 5 was void as the Governor's consent to the agreement had not been obtained.
- (ii) as to flat No. 4, there was nothing in the endorsement of the Governor's consent to indicate from what date it was to be effective and in the circumstances that consent could not be effective prior to the date on which it was given.
- (iii) the agreement in respect of the flat No. 4 was not a contingent contract, since the letting was expressed to take effect as from August 1, 1962, and there was nothing in the terms of the document to show that it was only to become operative if and when the consent of the Governor was obtained; accordingly this agreement was void ab initio, and the subsequent consent of the Governor could not convert it into an enforceable contract.

Judgment for the plaintiff for possession of both flats.

**Cases referred to in judgment:**

- (1) *Motibai Manji v. Khursid Begum*, [1957] E.A. 101 (C.A.).
- (2) *Denning v. Edwardes*, [1960] E.A. 755 (P.C.).
- (3) *Habib Devji v. P. C. Tarmohamed and Another*, [1960] E.A. 1022 (P.C.).

**Judgment**

**Bennett J:** In this suit the plaintiff claims from the defendant possession of two flats, arrears of rent for the two flats totalling Shs. 1,190/-, and mesne profits from May 1, 1962, until possession is given.

It is common ground that the two flats are in the same building and that the building is situated on land of which an African is registered proprietor.

It is also common ground that since both plaintiff and defendant are non-Africans the subletting of the two flats by the plaintiff to the defendant required the consent of the Governor under s. 2 of the Land Transfer Ordinance (Cap. 114).

Counsel for both parties agreed that the only issue to be tried was whether the two agreements (Annexures A and B to the plaint) whereby the plaintiff purported to lease to the defendant the two flats, were valid and enforceable, it being alleged in the written statement of defence that both agreements were void and unenforceable.

Both counsel agreed that if the agreements were valid the plaintiff was entitled to the rents and mesne profits claimed in addition to an order for possession, but that if the agreements were void the plaintiff was entitled to an order for possession only.

Mr. Carasco, for the defendant, contended that both subleases were void ab initio in that they purported to take effect as from August 1, 1962, whereas the Governor's consent was not given until September 13, 1962. He relied on the authority of *Motibai Marji v. Khursid Begum* (1), [1957] E.A. 101 (C.A.), and contended that the consent of the Governor could not be given with retroactive effect. Mr. Carasco also pointed out that the consent of the Governor

purported to have been given under the Buganda Land Law, 1908, and contended that no consent had been given under s. 2 of the Land Transfer Ordinance.

I will deal with his second point at once by saying that, in my opinion, it was unnecessary for the Governor to give two consents, one for the purposes of the Buganda Land Law and another for the purposes of s. 2 of the Land Transfer Ordinance. Section 2 of the Land Law and s. 2 of the Land Transfer Ordinance are complementary and if the Governor had consented to the subletting for the purposes of the Land Law, I fail to see how it can be said that the flats had been let by the plaintiff to the defendant without the Governor's consent in breach of s. 2 of the Land Transfer Ordinance. It is, however, plain from the document on which the Governor's consent is endorsed, when read with para. 3 of the plaint, that consent was only given to the sublease of one flat, namely, the flat referred to in the plaint as flat No. 4. So far as the flat referred to in the plaint as flat No. 5 is concerned, there is no evidence before the court of any consent to the sublease by the Governor. This being so, the agreement (Annexure B to the plaint) which purports to be a lease of flat No. 5, is void.

It remains to consider the position as regards flat No. 4. Mr. Singh, for the plaintiff, contended that s. 2 of the Land Transfer Ordinance did not require that the Governor's consent should be given before the execution of a lease, and that the consent itself was expressed to take effect as from the date on which the tenant took possession of the premises. The Governor's consent is in the form of a rubber stamp endorsement on a typewritten document which purports to be a consent by three Ministers of the Lukiko to the subletting of flat No. 4 and other flats in the same building. The words

"This consent to sublet is to take effect from the date of the possession by the said tenants of the said premises"

which appear in type are applicable to the Ministers' consent but cannot control the endorsement of the Governor's consent which purports to have been given on September 13, 1962, some 23 days after the date on which the Ministers signed the consent. There is nothing in the endorsement of the Governor's consent to indicate as from what date it was to be effective. In these circumstances I fail to see how the consent could be effective prior to the date on which it was given, namely, September 13, 1962. Moreover, the judgment of the Court of Appeal in *Motibai Manji v. Khursid Begum* (1), appears to indicate that it was not possible for the Governor to give consent with retroactive effect. To quote from the judgment:

"We think that the learned judge correctly held that the agreement was prohibited by law and was therefore void ab initio. That being so, nothing done subsequently could convert it into an enforceable contract. It must also be borne in mind that a breach of the provisions of s. 2 of the Land Transfer Ordinance is made a criminal offence by s. 4 and it could not be contended that the Governor by a subsequent consent could expunge liability for a criminal act."

In support of his contention that the Governor could give his consent to the lease after its execution Mr. Singh relied on the judgment of the Privy Council in *Denning v. Edwardes and Anor.* (2), [1960] E.A. 755 (P.C.), in which it was held that there was nothing in s. 88 of the Crown Lands Ordinance of Kenya which forbids the making of a written agreement for the sale of land which required the Governor's consent before the Governor's consent was obtained. Mr. Singh relied upon the following passage from the judgment:

"Sub-section (1) required the written consent of the Governor to an 'agreement for any of the transactions' set out in the sub-section. They include a transaction of sale. It has been argued that the consent of the

Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective.

"It is to be observed that in cl. 4 of the agreement the parties provided that –

‘The purchase and sale hereby effected is expressly made subject to the consent thereto of the Land Control Board and the Governor of the said Colony. In the event of such consents being refused then this agreement shall become null and void and any payment made by the purchasers shall thereupon be refunded to them but without interest.’

Thus the parties had every regard for the provisions of sub-s. (1) of s. 88 and it would be remarkable if they could not negotiate in the manner in which they did.”

In the instant case the agreement was not expressed to be made subject to the consent of the Governor being obtained so that it cannot be said, as was said in *Denning v. Edwardes* (2), that the agreement was inchoate until the consent was given.

The instant case is also distinguishable from *Habib Devji v. P. C. Tarmohamed and Anor.* (3), [1960] E.A. 1022 (P.C.), in which it was held that an oral contract to take on lease an area of mailo land subject to the Governor's consent being obtained under s. 2 of the Land Transfer Ordinance, was a contingent contract within s. 31 and s. 32 of the Contract Act, and that such a contract was not within the mischief of the Land Transfer Ordinance. In that case Sir Audley McKisack, C.J., aptly expressed the effect of the decision in *Motibai Manji's* (1) case, thus:

“On the question whether this contract was illegal Mr. D'Silva relies on *Motibai Manji v. Khursid Begum*, [1957] E.A. 101 (C.A.), and on *J. W. Sonko v. N. P. Danani*. Uganda High Court Civil Case No. 513 of 1957 (unreported). The principle to be derived from those cases is that, since the Land Transfer Ordinance prohibits a contract to purchase or take on lease land of which an African is the registered proprietor if the other party is a non-African, unless the Governor has given his consent in writing, a contract of this nature which has been entered into without that consent is void ab initio, and the subsequent granting of the Governor's consent cannot convert it into an enforceable contract. In those cases, however, there was no term in the contract to the effect that the contract should not be binding unless the statutory consent was obtained. In the instant case the contract was one which would not become enforceable unless and until the statutory consent was obtained.”

In the instant case it cannot be said that the agreement (Annexure A to the plaint) was a contingent contract, since the letting was expressed to take effect as from August 1, 1962, and there was nothing in the terms of the document to show that it was only to become operative if and when the consent of the Governor was obtained. I therefore hold that the agreement was void ab initio, and that the subsequent consent of the Governor to the subletting could not convert it into an enforceable contract.

My finding on the agreed issue is that both agreements were void and unenforceable. There will be judgment for the plaintiff for possession of both premises, possession to be given within seven days.

The defendant will pay the plaintiff's costs, such costs to be taxed on the subordinate court's scale, since the relief could have been granted by the District Court.

*Judgment for the plaintiff for possession of both flats.*

For the plaintiff:

*Sat Pall Singh*

*Haque Dalal & Singh, Kampala*

For the defendant:

*P Carasco*

*Carasco & Mistry, Kampala*

## **Riziki Binti Abdulla and another v Sharifa Binti Mohamed Bin Hemed and others**

[1963] 1 EA 429 (PC)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | Privy Council   |
| <b>Date of judgment:</b> | 17 December 1962  |
| <b>Case Number:</b>      | 63/1960   |
| <b>Before:</b>           | Lord Evershed, Lord Morris of Borth-y-Gest and Mr LMD De Silva                              |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | E.A.C.A. Civil Appeal No. 5 of 1959 on appeal from H.M. Supreme Court of Kenya – Edmonds, J |

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*[1] Mohamedan law – Wakf – Income of wakf property to adopted daughters and then successive interests created – Final gift over to charitable purposes – Descendants of adopted children not kindred of maker – Whether wakf saved by Wakf Commissioners Ordinance, 1951, s. 4 (K.) – Civil Procedure Ordinance (Cap. 5), s. 44 (K.) – Indian Transfer of Property Act, 1882.*

### **Editor's Summary**

The appellants were the adopted daughters of K. who by a deed dated December 3, 1942, purported to create a wakf of certain property belonging to her in favour of the appellants and certain other beneficiaries. The appellants were defendants in the original suit and the respondents were the plaintiffs



and the persons entitled to succeed to the maker's estate on an intestacy. The deed provided that "I do hereby declare that I have made wakf of the said lands and the buildings and improvements thereon for the ends, uses and purposes and subject to the conditions, provisions, reservations and stipulations set out . . ." and after making provision for the expenses of maintaining and administering the property, proceeded to create successive interests to be enjoyed beneficially and absolutely. Clause 6 of the deed provided that if the beneficiaries so appointed should die or fail, the income of the wakf should be devoted to assisting poor Mohamedan children, maintaining and assisting impoverished mosques and other charitable purposes of which the Prophet would approve. Section 4 (1) of the Wakf Commissioners Ordinance, 1951, provides, *inter alia*, that every wakf made by any Muslim which is made either wholly or partly for the maintenance and support of any person including the family, children, descendants or kindred of the maker is a valid wakf if in other respects it is made in accordance with Muslim law and the ultimate benefit in the wakf property is reserved for the poor or for any other purpose recognised by Muslim law as religious, pious or charitable purpose of a permanent character. The Supreme Court expressing the view that it was bound by the decision in *Sheikha binti Ali v. Halima binti Said*, [1958] E.A. 623 (C.A.), held that the wakf could

not be said to be for “maintenance and support” within the meaning of s. 4 (1) (a) of the Ordinance and that, therefore, the Ordinance did not cover it. The Court of Appeal affirmed the decision on this ground and on the further ground that the dispositions following those for the appellants themselves for life were not in favour of “any person including the family children descendants or kindred of the maker” for the purpose of s. 4 (1)(a) *ibid.* The court also rejected the submission on behalf of the appellants that the case of *Sheikha binti Ali v. Halima binti Said* was decided *per incuriam* and that the present case was distinguishable on the facts. On a further appeal

**Held –**

- (i) whatever may be the true answer to the problem created by the formula “any person including . . .” in sub-s. (1) of s. 4 *ibid.*, it could not be in doubt that the descendants of the maker’s two adopted children (the appellants) were outside the formula of sub-s. (2).
- (ii) the statute laid down the outer limits of the permissible range and an extension of this range by the addition of persons not covered by the section was not permissible and therefore the inclusion of such person in the range specified in the wakf deed would render it invalid.

Appeal dismissed.

[**Editorial Note:** The decision of the Court of Appeal is reported at [1959] E.A. 1035. The Board discussed the grounds of the decisions in both courts below but decided the appeal on a different ground.]

**Cases referred to in judgment:**

- (1) *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (1894), L.R. 22 I.A. 76.
- (2) *Fatuma binti Mahomed Bin Salim Bakhshuwn v. Mohamed Bin Salim Bakhshuwn*, [1952] A.C. 1.
- (3) *Sheikha binti Ali v. Halima binti Said*, [1958] E.A. 623 (C.A.).
- (4) *Amina binti Abdulla v. Sheha binti Salim* (1954), 21 E.A.C.A. 12.

**Judgment**

**Lord Evershed:** This is an appeal against a judgment of the Court of Appeal for Eastern Africa (Windham, Justice of Appeal with whom Forbes, Vice-President, and Gould, Justice of Appeal, agreed) delivered on December 10, 1959, dismissing an appeal against a judgment of the Supreme Court of Kenya delivered on October 28, 1959, declaring ineffective a written instrument dated December 3, 1959, declaring ineffective a written instrument dated December 3, 1942, by which one Khadija Binti Sulaiman Bin Hemed El Busaid (hereinafter referred to as the maker) sought to create a wakf of certain property belonging to her in favour of two adopted daughters and certain other beneficiaries. The appellants are the two adopted daughters. They were defendants in the original suit. The respondents were the plaintiffs and are persons entitled to succeed to the maker’s estate on an intestacy.

The maker made provision in the deed for defraying the expenses of maintaining and administering the property and appointed successive trustees (or mutawallis) of whom she was the first. She then proceeded to make the following provision in cl. 3 and cl. 6 which, as observed by the Court of Appeal, contain (subject to one reference later made) everything in the deed material to this case:

“3. The free balance of the income of the wakf property shall be divided each month between my said

adopted daughters in equal shares and upon the death of one or other of my said adopted daughters, her share shall be divided equally among her sons and daughters and their issue per stirpes,

brothers taking the same share as sisters, and, failing issue of either of my adopted daughters, the half share of the income that would have gone to such issue shall be divided (first) equally among my sisters Sharifa, Kalathumi, Rukiya and Mwana Wa Sheh each of whom and, failing her, her issue shall take one part (second) the surviving adopted child or her issue per stirpes who shall take one part and (third) the children of my late brother Seif bin Mohamed El-Busaid including his adopted child, and, failing any of such children, their issue per stirpes who shall take one part equally among them.

.....

- “6. If the beneficiaries so appointed shall die out or fail, the income of the wakf shall be devoted to assisting poor Mohamedans, promoting the Mohamedan faith, educating Mohamedan children, maintaining and assisting impoverished mosques and other charitable purposes of which the Prophet would approve.”

Their lordships are aware that recent decisions of the Indian and other courts, including decisions of the Privy Council, have, by some learned in the principles of Mohammedan law, been regarded as failing in true appreciation of those principles. But, in their lordships’ opinion, it cannot be in doubt that the legislation in Kenya and other countries, aimed at validating certain documents as effective wakfs, has been passed on the basis that these decisions have been accepted by the respective legislators as effective interpretations of the law: and such legislation must be construed accordingly. The problem having therefore become one of the application of local legislation, their lordships’ function in the present case must be to construe, according to well-recognised principles, the Kenya Ordinance of 1951. In light, however, of what has been said, it is in their lordships’ opinion both relevant and permissible to take note of the general form of the document of 1942 submitted to constitute a wakf. In general form and structure the document follows and follows precisely those of an ordinary English settlement. The terms of the final gift over in cl. 6 are not forgotten. Nonetheless, the language chosen by the draftsman (and the maker) is characteristic of that which would, in an English instrument, be ordinarily appropriate and apt for the creation of successive interests to be enjoyed beneficially and absolutely – but with a final gift over for “charitable purposes” to take effect only upon (and at the date of) the failure of all the previous interests. Their lordships take note (in addition to the language of the passages already quoted) of the words immediately preceding the operative part of the deed:

“in consideration of my natural love and affection for my adopted daughters . . . and the other beneficiaries hereinafter mentioned”

and they add that it is plain from a reading of the document that the word “beneficiaries” is confined to the donees specified in cl. 3. Their lordships accordingly confess to having been conscious of a certain feeling of unreality in being invited to treat a document so framed as being an expression of the principles (including the religious beliefs) which they understand to have underlain the ancient Mohamedan conception of the wakf.

It is indeed, as their lordships understand, common ground that, owing to the nature of the provisions it contains, the deed would be invalid as a wakf unless covered by the Ordinance of 1951. As this position is accepted by both parties their lordships do not think it necessary to discuss it at great length but they feel that some of the considerations which lead to this result, shortly set out, would be useful for an understanding of the decision in this case.

In the creation of a wakf a substantial gift for charitable purposes, for instance a gift to the poor, is a material element. The board took the view in 1894 in

*Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (1) (1894), L.R. 22 I.A. 76, amongst other things that

“provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family”

(by this was meant the succeeding generations of a family) was so remote as to be illusory and was not sufficient for the creation of a valid wakf.

In 1951 in the case of *Fatuma binti Mahomed Bin Salim Bakhshuwen v. Mohamed Bin Salim Bakhshuwen* (2), [1952] A.C. 1, the board was invited to re-examine and restate the relevant principles of Mohammedan law. The board refused to do so, pointing out *inter alia* –

“... they have carefully considered not only the so-called leading case (*Abdul Fata's* case, L.R. 22 I.A. 76), but numerous cases decided before and after that date in the courts of India and the Privy Council. In particular they have examined what truly might be called the leading case in this branch of the law, *Bikani Mia v. Shuk Lal Poddar*, I.L.R. 20 Calc. 116, in which Ameer Ali, J., in a long dissenting judgment brought all the resources of his great learning to bear in support of the validity of such a wakf as that now under consideration. There is no doubt that that judge and Mohammedan lawyers in general who thought with him were convinced that the judgment was wrong. But it appears to their lordships that, whatever views might have been entertained in the eighteenth and earlier centuries, by the end of the nineteenth the trend of judicial opinion was firmly set in favour of the view that such wakfs were invalid, and that the conclusions to which the High Court of Calcutta and this board came were inevitable. And in many cases after *Abdul Fata's* case the same conclusion was reached. As Lord Robertson said in *Mujibunnissa v. Abdul Rahim*, L.R. 28 I.A. 15, 23: ‘It will be so [i.e. the wakf will be valid] if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator’s family’. If the result was not acceptable to Muslim sentiment, it was to the legislature that recourse must be had.”

The principles laid down in the cases mentioned were laid down after the most careful consideration of the points for and against them and for the reasons already given must be accepted subject of course to such modification as has been made by statute.

By the Wakf Commissioners Ordinance, 1951, of Kenya, the principles laid down by the courts were to some extent relaxed.

The relevant portions of the Ordinance are:

“4. (1) Every wakf heretofore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes, that is to say –

- (a) for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker; or
- (b) if the maker of the wakf is an Ibathi or Hanafi Mohammedan, for his own maintenance and support during his lifetime,

is declared to be a valid wakf if –

- (i) it is in every other respect made in accordance with Muslim law; and
- (ii) the ultimate benefit in the property the subject of such wakf is expressly, or, in any case in which the personal law of the person

making the wakf so permits, impliedly, reserved for the poor or for any other purpose recognised by Muslim law as a religious, pious or charitable purpose of a permanent character:

Provided that the absence of any reservation of the ultimate benefit in property the subject of a wakf for the poor or any other purpose recognised by Muslim law as a religious, pious or charitable purpose of a permanent character shall not invalidate the wakf if the personal law of the maker of the wakf does not require any such reservation.

- (2) No wakf to which sub-s. (1) of this section applies shall be invalid merely because the benefit in the property reserved by such wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf."

Where a statute is enacted to permit provision in a wakf which would otherwise render it invalid the statute has, in their lordships' view, to be closely examined in order to ascertain the limits of the provision which may be made. A wakf which contains in addition provisions which would have invalidated it and which are not covered by the statute would continue to invalidate it.

The Supreme Court in the present case held that the wakf could not be said to be for "maintenance and support" within the meaning of s. 4(1) (a) of the Ordinance, and that therefore the Ordinance did not cover it.

The Court of Appeal upheld this view in dismissing the appeal. It also held that the appeal had to be dismissed upon another ground (discussed later) which was not considered by the Supreme Court.

Dealing with the first ground the Supreme Court and the Court of Appeal held that they were bound by a previous decision in the case of *Sheikha binti Ali v. Halima binti Said* (3), [1958] E.A. 623 (C.A.). In that case there was an absolute gift of income and it was held that the wakf was invalid. In the instant case also there is an absolute gift of income. It was argued by the appellants in both the courts in Africa that (1) that case was distinguishable from the present case on the facts and (2) that it was reached per incuriam. A good deal of discussion took place upon the argument. Their lordships do not think it necessary to consider all the points that arose upon this discussion because they are of opinion that as laid down by the Court of Appeal in *Sheikha binti Ali's* case (3) an absolute gift of income is something wider than, and different in kind from, a gift for maintenance and support. It may often be difficult to determine whether a particular use to which a gift is put to is one for "maintenance and support" and such cases will have to be decided as the question arises on the facts of each case. But in this case no such question arises. There are clearly many uses to which a gift may be put when it is an absolute gift which have nothing to do with "maintenance and support". To take one instance, upon the widest interpretations of those words which could in the context be possibly urged, their lordships are of the view that it could not be urged that they cover gambling. An absolute gift could undoubtedly be used for such a purpose. The very words "maintenance and support" need not necessarily be used in the deed but words indicative of such purpose as distinct from an unqualified right of user arising from an absolute gift are necessary. In the judgment of the Supreme Court in *Sheikha binti Ali's* case (3) Mayers, J., had said:

"While I do not pause to enquire exactly what may or may not be included in the term 'maintenance and support' I have no hesitation in expressing the opinion that that phrase in its natural sense is not co-extensive with such a phrase as 'for the use of the beneficiary in whatever manner he may think fit'."

Their lordships are of the view that that statement correctly reflects the true position.

It was urged before the Court of Appeal that it was permissible to lead extraneous evidence to prove that the purpose of the wakf was to maintain and support the appellants. The Court of Appeal quoting from another case stated the general principle applicable to be –

“... when the terms of a disposition of property have been reduced to the form of a document, under s. 91 of the Evidence Act no evidence can be given in proof of the terms of such disposition except the document itself or secondary evidence thereof”.

This is evident from the section itself. There is nothing in the present case which would justify a departure from this principle.

It was urged in the Court of Appeal that *Sheikha binti Ali's* case (3) ought not to be followed *inter alia* because the “attention of the court was not specifically directed to, nor did the court specifically refer to” the significance of the words “either wholly or partly” which appear twice in the first five lines of s. 4(1) (above). Their lordships have considered those words and do not see in them any reason to alter the view, expressed in *Sheikha binti Ali's* case (3) that s. 4(1)(a) is not satisfied where the disposition is an absolute gift. There was no provision in *Sheikha binti Ali's* case (3) nor is there in the instant case that the gift should be used wholly or partly for “maintenance and support”. On the absolute gift created it might have been so used. But that is not sufficient to satisfy s. 4 (1)(a). It might equally have been used wholly for a purpose totally unconnected with maintenance and support such for instance as gambling.

One further point remains. Not only has the Indian Transfer of Property Act, 1882, been made applicable to Kenya but by the Kenya Civil Procedure Ordinance (Cap. 5), para. 44 (1)(2), it is expressly provided that a person's right to receive future maintenance is not liable to attachment in favour of that person's creditors. In other words it would seem, if Mr. Foot's argument were accepted, inevitably to follow that the rights to shares of income given by the document of 1942 would be immune from attachment or other process for the payment of that person's creditors. Their lordships confess to the greatest difficulty in attributing such a result to the language chosen by the maker of this instrument; and therefore find themselves unable to take the view that, whatever be the true scope of the formula “maintenance and support” in the relevant Ordinance, it can cover gifts framed as have been the benefactions in the present case.

There is however a second ground upon which the Court of Appeal held that the plaintiffs' claim should fail – namely because (as the Court of Appeal stated) –

“the dispositions following those for the appellants themselves for life are not in favour of ‘any person including the family, children, descendants or kindred of the maker’ for the purpose of s. 4 (1)(a)”.

It sought to follow a decision of its own in a previous case, namely *Amina binti Abdulla v. Sheha binti Salim* (4)(1954), 21 E.A.C.A. 12. In the case mentioned the Court of Appeal found some difficulty in construing the words “of any person including the family, children, descendants or kindred of the maker”. The Vice-President (Sir Newnham Worley, with whom the President, Sir Barclay Nihill, and Justice of Appeal Briggs agreed) said:

“The contention of the plaintiff/respondent (which was accepted by the trial court) was that while this expression was admittedly clearly wide enough to cover a wakf for the benefit of a living stranger, yet taken in its

context and with due regard to the other provisions in the section, it was not intended to and does not include the children and descendants of a stranger. For the defendants/appellants it was contended that the expression 'any person' (which of course, includes the plural) could and should be construed independently of any following words and, being given its full force and meaning, would cover not only a living stranger, but also an unborn stranger and the unborn descendants of any such person from generation to generation.

"I have come to the conclusion that the learned judge in the court below was right in rejecting this last argument and accepting the argument of the plaintiff/respondent, although I must confess that I have not found the problem quite so easy of solution as he did. It must, I think, be conceded that the *prima facie* meaning of 'any person' is wide enough to include, as the appellants have contended, not only a living but also an unborn person, and it must also be conceded that the insertion of these words in para. (a) of sub-s. (1) of s. 4 was intentional for they did not appear in that clause as published in the original Bill which appeared in the *Official Gazette* of January 30, 1951; in that Bill cl. (a) followed the Indian and Zanzibar equivalents and whatever the purpose behind the addition of the words 'any person' I cannot regard the method of amending the clause as wholly satisfactory and explicit."

Their lordships are very much of the same view as that expressed in the last sentence quoted and would suggest that at some convenient time the legislature should make clear what was intended to be enacted.

*Prima facie*, no doubt, the words "any person" should be taken to mean what they say and so to comprehend any person whatever, whether living or not and whether or not connected in any way with the maker of the instrument. But if this be the meaning of the words "any person", then it must follow that all the words which immediately follow, namely, "including the family, children, descendants or kindred of the maker" are wholly tautologous. Moreover the terms of sub-s. (2) of the section –

"no wakf to which sub-s. (1) of this section applies shall be invalid merely because the benefit in the property reserved by such wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker. . ."

would, on this view, not at all fit with sub-s. (1) and would indeed be capricious to the point of absurdity. Upon clear and well-established principles it is necessary to construe the relevant section as a whole – particularly to construe the language of sub-s. (1)(a) in light of, and so as to make it, if possible, consistent with sub-s. (2). On this view it seems to their lordships plain that what was intended by sub-s. (2) was to save from invalidity a wakf which conformed with sub-s. (1) but was (upon existing authorities) open to the challenge that the final "charitable" gift, expressed to take effect on the failure of the dispositions comprehended in sub-s. (1), was too remote.

One construction, which has undoubtedly much to commend it, is to treat the phrase "any person including. . ." as meaning "any person of the class comprehending. . .". Sub-section (1) or (2) would then perfectly fit. But the result would be that the insertion of the words "any person" would have no practical effect whatever. Their lordships are reluctant so to construe the subsection and not the less so since the courts in Kenya have treated the formula as apt to cover any living person or persons though not belonging to the class of the maker's family, children, descendants or kindred. If this view is accepted, then the formula would and should be interpreted as meaning



“any living person or persons and also members of the maker’s family, children, descendants and kindred even though not living”.

This view has the advantage of giving sense and meaning to the words “any person” and at the same time making, for practical purposes, sub-s. (2) consonant with sub-s. (1).

Their lordships find themselves, however, unable to go any further with the appellants and to treat the phrase “any person” as comprehending any person or persons whatever whether living or not. The result is that (if the view above expressed is right) in the present case the deed of 1942 must fail in any case to fall within the terms of sub-s. (1) of s. 4 of the Ordinance, even if their lordships were wrong in the view they have expressed of the meaning of the words “maintenance and support”.

There is however a still further difficulty in the appellants’ way. Both s. 4 (1) and s. 4 (2) have to be satisfied by the instrument under consideration before it can be said to be saved by the Wakf Commissioners Ordinance, 1951. For the purposes of this case it is, in their lordships’ opinion, strictly unnecessary to arrive at a final conclusion whether s. 4 (1) is satisfied and for the following reason. If s. 4 (1) is not satisfied the appeal would fail. But assuming that s. 4 (1) is satisfied the appeal would still fail because, in their lordships’ view, s. 4 (2) is in any case not satisfied. The reasons are set out in the following paragraphs. This means that whatever view is taken of s. 4 (1) the appeal fails on a consideration of the provisions of s. 4 (2).

The inclusion in the wakf deed of a large number of persons specified in it who had to become extinct before the charitable purpose of the wakf was achieved was one of the reasons why the wakf deed discussed in the *Bakhshuwen* case (2) was held to be illusory and ineffective to create a wakf. The provision for the charitable purpose was held to be too remote. This view was relaxed to some extent by s. 4 (2) which provided:

“(2) No wakf to which sub-s. (1) of this section applies shall be invalid merely because the benefit in the property reserved by such wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf.”

It is conceded (rightly in their lordships’ view) that but for the enactment just quoted a wakf deed which made the provision made permissible by the enactment would be invalid. Section 4 (2) makes it permissible to stipulate that the

“charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf”.

Whatever be the true answer to the problem created by the formula “any person including. . .” in sub-s. (1) of the section it cannot be in doubt that the descendants of the maker’s two adopted children (who are beneficiaries under cl. 3 of the deed and to the extinction of whom, among others, the “charitable” gift in cl. 6 is made dependent) are outside the formula of sub-s. (2).

Their lordships are of the view that the statute was laying down the outer limits of the permissible range. In their lordships’ opinion an extension of this range by the addition of persons not covered by the section is not permissible, and the inclusion of such persons in the range specified in the wakf deed would therefore render it invalid.

In the circumstance, it is unnecessary to consider whether the two adopted daughters might fall within the word “family”. But it was urged that even if the wakf deed be regarded as invalid for the purpose for which it was created

parts of it should be given effect to; for instance the part which makes a gift to the appellants, the two adopted daughters. At the beginning of the wakf deed there occur the following words:

“I do hereby declare that I have made wakf of the said lands and the buildings and improvements thereon for the ends, uses and purposes and subject to the conditions, provisions, reservations and stipulations hereinafter set out, videlicet . .”

Then follow among other things the provisions earlier set out above. Their lordships are of the view that in such circumstances the instrument must either be effective to create a wakf in its entirety or, if no such wakf was created, the instrument is totally void. It is not permissible to ignore the words just quoted and by reference to certain passages out of their context to hold that a simple gift or settlement was created. Equally to treat the deed as operating as a valid wakf during the respective lives of the two adopted daughters would involve an interpretation of the instrument different in respect of the interests given to the adopted daughters from that of the language appropriate to the other beneficiaries. In the circumstances their lordships have been unable to derive from the cases cited by Mr. Foot sufficient authority for such a partial validation. Their lordships add also that it is in any case far from clear what the effect would be of such a partial validation upon the operation of the instrument after the death of the survivor of the adopted daughters. As a matter of the construction of the language there would appear to be no justification for “advancing” cl. 6 of the deed so as to allow it to take effect on the happening of that event.

For the reasons they have given their lordships think that the appeal must fail. Their lordships make no reference to s. 16 and s. 21 of the Ordinance discussed in the judgment appealed from as counsel intimated that no point based upon them was being made before their lordships.

Their lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed. In all the circumstances of this case their lordships are of opinion that no order should be made as regards the costs of the present appeal.

*Appeal dismissed.*

For the appellants:

*Dingle Foot QC* and *RK Handoo* (both of the English Bar)

*TL Wilson & Co*, London

For the respondents:

*TJ Inamdar*, *Mervyn Heald* (of the English Bar) and *ST Inamdar*

*Knapp-Fishers and Blake and Redden*, London

**Maamun Bin Rashid Bin Salim El-Rumhy v Haider Mohamed Bin Rashid  
El-Basamy**  
[1963] 1 EA 438 (SCK)

**Division:** HM Supreme Court of Kenya at Mombasa

**Date of judgment:** 17 June 1963

**Case Number:** 16/1963  
**Before:** Pelly Murphy J  
**Sourced by:** LawAfrica

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*[1] Probate and administration – Petition for grant of administration – De bonis non – Executor dead – Administration not completed – Petitioner an heir of an heir – Issue of notices of citation to interested persons – Issue as matter of course – Whether practice correct – Caveat lodged by interested person – Whether caveat should be lodged – Whether claim of superior right can be asserted by lodging caveat – Indian Probate and Administration Act, 1881, s. 19, s. 20, s. 23, s. 46, s. 69 and s. 70.*

### **Editor's Summary**

On December 15, 1962, the plaintiff petitioned the court for a grant of letters of administration de bonis non in respect of the estate of one F., deceased, who had died on May 4, 1927, after having made a will dated November 11, 1926. It was not until June 10, 1946, that the will was proved and probate granted to one H., the executor, who died on November 13, 1961, without having completed the administration of the estate. On December 18, 1962, on the application of the plaintiff the court issued notices of citation to eight persons as being persons interested in the estate. The notices were to the effect that application for a grant had been made by the plaintiff and that the court would proceed to issue a grant to him “unless cause be shown to the contrary” and appearance entered before a stated date. On January 24, 1963, the defendant, a son of one of the heirs of the deceased, entered appearance and lodged a caveat under s. 70 of the Indian Probate and Administration Act, 1881. At the hearing the defendant desired to set up his paramount title as being in issue, but his advocate, having considered the decision in *Debendra Prasad Sukul v. Surendra Prasad Sukul and Others* (1920), A.I.R. Pat. 343, then sought to establish that the plaintiff was not entitled to the grant at all. On behalf of the plaintiff it was submitted that his claim to the grant of administration was established because he was the heir of a residuary legatee and was entitled to the grant by virtue of s. 19, s. 20 and s. 23 of the Act. It was common ground that neither the plaintiff (petitioner) nor the defendant (caveator) was a direct heir of the deceased but that each had an interest in her estate as heir of an heir, and that none of the “direct” heirs of the deceased was alive.

### **Held –**

- (i) the practice of the court to order, as a matter of course, that citations issue to all persons shown in the petition as being heirs of the deceased, was incorrect; therefore, save in cases where the court considers it necessary, non-contentious citations should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it.
- (ii) a caveat should be filed only if a person wishes to argue that the person who has applied for the grant has no right thereto; if, on the other hand, the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, the proper course for him to adopt is to enter an appearance to the citation and himself apply for a grant.
- (iii) the effect of the deceased's will was to make her heirs her residuary legatees; therefore, any of the heirs had a right to a grant of administration de bonis non after the death of the executor.

- (iv) as all the residuary legatees were dead, the representative of any one of them had, by virtue of s. 20 *ibid.*, the same right to a grant of administration as had the legatee whom he represented; the expression “representative” in this section meant, not the legal personal representative, but a person who was entitled to a share in the estate under the law governing the distribution of the estate.
- (v) it did not matter that the plaintiff was not a “direct” heir; he was a person interested in the estate of the deceased, that interest having accrued to him under the rules of distribution applicable in this case.

Letters of administration granted to the plaintiff/petitioner.

Caveat ordered to be lifted.

### Cases referred to in judgment:

- (1) *Debendra Prasad Sukul v. Surendra Prasad Sukul and Others* (1920), A.I.R. Pat. 343.
- (2) *Haribhusan Datta v. Manmatha Nath Datta* (1918), 45 Cal. 862.

### Judgment

**Pelly Murphy J:** On December 15, 1962, one Maamun bin Rashid bin Salim El-Rumhy (to whom I shall refer hereafter as the petitioner) petitioned the court for a grant of letters of administration *de bonis non* in respect of the estate of Fatuma binti Mbaruk bin Khamis El-Riyamiya (to whom I shall refer hereafter as the deceased). The deceased died on May 4, 1927, having made a will dated November 11, 1926. It was not, however, until June 10, 1946, that the will was proved and probate granted to Haidar bin Mohamed El.-Mandry (to whom I shall refer hereafter as the executor) the executor named therein. The executor died on November 13, 1961, without having completed the administration of the estate of the deceased.

On December 18, 1962, upon the application of the advocate for the petitioner, the court made an order that notices of citation should issue for service upon eight persons who were named in the application as being interested persons. The order for these citations was made under the provisions of s. 69 of the Indian Probate and Administration Act, 1881 (to which I shall refer hereafter as the Act) but the object for which they were issued to the persons named was not stated in the order or in the citations themselves. I am informed that, in every case in which a grant of letters of administration is applied for, it has been the practice of this court to order, as a matter of course, that citations issue to all persons shown in the petition as being heirs of the deceased. In my opinion that practice is incorrect. I think that, where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs (whose existence is disclosed in the petition) having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order. The object of a non-contentious citation is to call upon a person who has a superior right to a grant to take the grant. Thus any person who has an interest in having an estate administered may apply for a grant of representation, but, if there are persons who have a superior right to obtain the grant, he must cite such persons calling upon them to apply for the grant. If the persons cited fail to apply for a grant or renounce their right to it, the grant may, subject to the usual conditions, be given to the citor. It follows that, save in cases where the court thinks it necessary to do so, non-contentious citations

should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it.

The notices issued by the court in this case were to the effect that application for a grant had been made by the petitioner and that the court would proceed to issue a grant to him “unless cause be shown to the contrary” and appearance entered before a stated date. On January 24, 1963, an appearance was entered for Haider Mohamed bin Rashid El-Basamy (the son of one of the heirs of the deceased) one of the persons served with the notice of citation (to whom I shall refer hereafter as the caveator). On the same day the caveator lodged a caveat under the provisions of s. 70 of the Act. It seems to me that the lodging of a caveat by him was unnecessary and has unnecessarily complicated this matter. Although r. 1 of the Probate and Administration (Contested Suits) Rules, requires any person intending to oppose the issue of a grant of probate or letters of administration to file a caveat, this step seems to me to be unnecessary and undesirable where the person in question has been cited unless he wishes to argue that the person who has applied for the grant has no right thereto. If, on the other hand, the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, in my opinion, the proper course for him to adopt (after he has been served with the citation) is to enter an appearance to the citation and himself apply for a grant to be made to him if he so wishes. If the person cited enters an appearance but takes no further step, the citor may apply on summons for an order directing the person cited to take the grant within a stated time. In the event of the latter neglecting to do so, the grant will be ordered to be made to the citor. In the instant case at the hearing, the caveator through his advocate desired to set up his paramount title as being in issue. In my opinion the decision in *Debendra Prasad Sukul v. Surendra Prasad Sukul and Ors.* (1) (1920), A.I.R. Pat. 343, makes it clear that the only issue before the court in a cause brought as a result of a caveat being entered is whether or not the person who has applied for the grant is entitled to it and there is no issue as to whether he or some other person has a better right to the grant. Mr. Bargash, who appeared for the defendant, having considered the decision in *Debendra Prasad Sukul v. Surendra Prasad Sukul and Ors.* (1), conceded that the defendant was not entitled to ask the court to decide whether or not the caveator had a better title to the grant than the petitioner. He then sought to establish that the petitioner was not entitled to the grant at all.

Mr. Pandya for the petitioner submitted as the first limb of his argument that the plaintiff’s claim to the grant of administration was established because he is the heir of a residuary legatee.

It seems to me that, in order to decide the questions here in issue, reference should first be made to s. 46 of the Act. That section provides that, in granting letters of administration de bonis non, the court should be guided by the same rules as apply to original grants. In this case the deceased (by the first paragraph of her will) made certain specific bequests to charity and directed that her debts should be paid. By the second paragraph she appointed her son to be her executor and directed him to distribute her estate among her heirs “in a just manner”. In my opinion the effect of that will (in so far as it relates to the matters in issue) was to make her heirs her residuary legatees. If I am right in so finding, any of the heirs had a right to a grant of administration de bonis non after the death of the executor.

At the hearing counsel for the parties agreed that the facts as to the relationship of the petitioner and the caveator with the deceased are those set forth in the plaint; that neither the petitioner nor the caveator is a “direct” heir of the deceased but that each of them has an interest in her estate as an heir of an heir; and that none of the “direct” heirs of the deceased are alive.

All the residuary legatees being dead, it seems to me that the representative of any one of them has, by virtue of s. 20 of the Act, the same right to a grant of

administration as had the legatee whom he represents. In my opinion the expression “representative” in this section means, not the legal personal representative, but a person who is entitled to a share in the estate under the law governing the distribution of the estate (*Haribhusan Datta v. Manmatha Nath Datta* (2) (1918), 45 Cal. 862). In other words, the heir of an heir is a representative and as such can apply for and may be granted administration with the will annexed. Here it is common ground that the petitioner is the heir of Rukia who was one of the heirs of the deceased. In addition, however, the petitioner is the administrator (under a grant of administration issued by this court) of the estate of Rukia and is therefore her legal personal representative.

The second limb of Mr. Pandya’s argument is that the plaintiff is entitled to the grant for which he has applied by virtue of s. 19 and s. 20 of the Act and that then s. 23 must be referred to. It is not disputed that, on the death of the deceased, Rukia inherited a one-fifth share of her estate. When Rukia died that share passed to her heirs under the rules of distribution applicable to her estate. The petitioner is one of the heirs of Rukia. Under Mohamedan law his share vested in him without the necessity for a grant of administration. Mr. Pandya submitted, and in my opinion his submission is correct, that the petitioner as one of the heirs of Rukia, is a beneficiary and has a right to have the deceased’s estate administered. In my opinion it does not matter that the petitioner in this case is not a “direct” heir. He is a person interested in the estate of the deceased, that interest having accrued to him under the rules of distribution applicable in this case.

In my opinion the grant of letters of administration prayed for by the petitioner should be issued to him and the caveat should be lifted. I so order.

Although it is not necessary to do so, I think it desirable to make it clear that the granting of letters of administration to the petitioner in no way hurts or prejudices the caveator. An administrator has to furnish adequate security to the court for the due administration of the estate and any person who is interested and who considers that the estate is not being properly administered can invoke the aid of the court to deal with any non-feasance or misfeasance of the administrator. It appears to me that the litigation in the instant case probably stemmed from the mistaken belief that, in granting administration to one of the persons entitled thereto, the court is pronouncing that that person has a superior right of inheritance to that of any other heir. That is, of course, a completely erroneous view. It does, however, seem to me that the practice of this court in issuing notices of citation as a matter of course has led to confusion and in this case has contributed to the mistaken belief which I think may have prompted the institution of these proceedings.

Mr. Pandya has asked for an order that the caveator should pay the costs of these proceedings and relied on r. 7 of the Probate and Administration (Contested Suits) Rules, as showing that that was the proper order. For the reasons I have given above I think that the caveator has been misled by the practice which has been in existence with regard to matters of this kind and, in the exercise of my discretion, I make no order against him as to costs.

*Letters of administration granted to the plaintiff/petitioner. Caveat ordered to be lifted.*

For the plaintiff:

*KM Pandya*

For the defendant:

*ME Bargash*

For the petitioner:  
*KM Pandya*, Mombasa

For the caveator:  
*ME Bargash*, Mombasa

**Selemani s/o Ussi v Republic**  
**[1963] 1 EA 442 (CAD)**

**Division:** Court of Appeal at Dar-Es-Salaam  
**Date of judgment:** 14 September 1963  
**Case Number:** 99/1963  
**Before:** Sir Trevor Gould Ag P, Crawshaw Ag V-P and Newbold JA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Tanganyika – Spry, J

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[1] *Criminal law – Evidence – Strict proof required of admissions – Indian Evidence Act, 1872, s. 58.*

[2] *Criminal law – Trial – Assessors – Opinion of assessors not taken specifically whether accused guilty or not guilty as charged – Desirability of obtaining such opinion – Criminal Procedure Code (Cap. 20), s. 283 (1) (T.).*

[3] *Criminal law – Murder – Plea of self-defence – Deceased killed while attempting to apprehend accused – Accused in state of fear and anticipating severe beating if caught – Whether plea of self-defence available – Penal Code, s. 18 (T.) – Criminal Procedure Code (Cap. 20), s. 32 (1) (T.).*

**Editor’s Summary**

The appellant stabbed and killed the deceased who, with other persons, was pursuing the appellant at night with a view to apprehending him on a reasonable suspicion that he had committed a felony. The record of the trial stated that the information was read over and explained to the accused in his own language and that he was required to plead thereto, and proceeded “Plea. Entered as a plea of ‘not guilty’ to the charge”. During the trial prosecuting counsel asked if the defence would “concede that the accused stabbed another person besides the deceased” and defending counsel agreed. Subsequently when asked for their opinions, the assessors gave these, but they were not asked nor did they state specifically whether they considered the accused was guilty or not guilty as charged. The trial judge found that, when he stabbed the deceased, the appellant was in a state of fear and expected a severe beating if caught but that he was not in imminent danger of his life and in convicting the appellant of murder the judge held that he was not acting in self-defence.

On appeal against conviction

**Held –**



- (i) it was a possible implication of the record that the appellant had not pleaded at all; and it would have been better simply to have entered the words “Not guilty” after the word “Plea”.
- (ii) the ambiguous words used by prosecuting counsel might have been construed as meaning that the admission went to the stabbing of the deceased as well as another and though it caused no injustice in the instant case, it was not a procedure which should be adopted.
- (iii) if s. 58 of the Indian Evidence Act, 1872, which states that admitted facts need not be proved, applies to criminal cases, then the proviso to the section should be applied strictly so as to ensure that all relevant facts are proved by evidence in the usual way.
- (iv) in addition to any other answers which may be given, each assessor should state specifically whether he considers the accused person to be guilty or not guilty on each count on which he is required to state his opinion.
- (v) the findings of facts by the judge fully supported his decision that the appellant was not acting in self-defence; the appellant had no right to use any force at all and therefore there was no question of excessive force or of manslaughter.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Wachira s/o Wambogo v. R.* (1954), 21 E.A.C.A. 396.
- (2) *R. v. Biggin*, 14 Cr. App. R. 87; [1920] 1 K.B. 213.
- (3) *R. v. Howe* (1958), 32 Australian Law Journal Reports 212.
- (4) *Marawa s/o Robi v. R.*, [1959] E.A. 660 (C.A.).
- (5) *R. v. Berezeri Kayongo* (1943), 10 E.A.C.A. 116.

**Judgment**

**Sir Trevor Gould Ag P:** read the following judgment of the court: The appellant was convicted on June 21, 1963, in the High Court of Tanganyika at Dar-es-Salaam of murdering Salim Selemani in the Southern Region on the night of February 14/15, 1963.

Mohamed Salim gave evidence that on the night when the appellant was arrested he was called by his brother who complained that his house had been broken into. The witness saw a box which had been forced open and some clothing was missing. At that moment he heard cries of “Thief, Thief” outside. Going outside he saw that one Subini had run into a thicket to try to get the suspected thief out. A man whom he recognised as the appellant ran out and was pursued by Yusufu Ali, the deceased, and the witness. He heard Yusufu Ali cry that he had been stabbed with a knife; then he heard the deceased (presumably he heard him cry out though the record does not so state) who was not carrying any weapon. The appellant then entered another thicket and was arrested. Yusufu Ali said that there were many people present surrounding the first-mentioned thicket; he described his chase of the appellant, who, he said, stopped and stabbed him with a knife. As he fell down the deceased jumped over him and caught hold of the appellant who stabbed him on the left of the stomach. Yusufu also said that the deceased was unarmed.

The deceased, according to medical evidence, died from a stab wound in the region of the lower left ribs, three of which were cut through. A knife, stained with human blood, was found in the vicinity but there was no evidence that it belonged to the appellant. Neither was there any evidence that he had any connection with the theft from the house of Mohamed Salim’s brother. There was other evidence confirmatory of the fact that the deceased was stabbed by the appellant, but that was hardly put in issue by the appellant.

The appellant made an unsworn statement in the High Court in which he claimed to have heard the alarm and joined the people surrounding the thicket. He continued:

“I got into the thicket in order to get the thief. But the thief was not there. I left the thicket in the other direction and the people who saw me thought I was the thief. Many people came and beat me. They wanted to slaughter me but fortunately I took the knife from them. As there were many people, I pulled out the knife and stabbed one of them. At that time, those people were complaining and I ran away. When I ran, they got hold of me again and stabbed me on top of my head. Then I got into another thicket and they still pursued me. They did not see me because it was night. About 6 a.m. they saw me hiding myself somewhere. Many people came and they arrested me. Fortunately, it was morning – if it had been night they would have killed me. Then

they sent me to someone's homestead – I don't know his name. So they put some clothes on me which they alleged I had stolen, and they produced a knife which they said was the one I had used for stabbing. All this time I was being beaten, and I was saved when the policeman came from Newala.”

Yusufu and Mohamed Salim denied that the appellant was beaten and their evidence was accepted by the learned judge. The appellant did have a cut on his head which was unexplained by the prosecution witnesses except by the suggestion that it could have been sustained while running through the thicket.

Before we proceed to the merits of the appeal there are certain points in relation to the record and the trial which require to be noticed. The first touches the recording of the plea on arraignment. It appears in the record thus:

“Information is read over and explained to the accused in his own language and he is required to plead thereto.

Plea.

Entered as a plea of ‘Not Guilty’ to the Charge.”

A possible implication of this record appeared to be that the appellant had not pleaded at all, though, as the trial proceeded as on a plea of not guilty, that seemed in the highest degree unlikely. We accordingly obtained a report from the trial judge under r. 42 (4) of the rules of this court which was to the effect that the appellant’s words on being asked to plead being discursive (and possibly prejudicial) he had had in mind the observations of this court in *Wachira s/o Wambogo v. R.* (1) (1954), 21 E.A.C.A. 396, and, when he was satisfied that the words of the appellant amounted to a plea of not guilty he entered that plea simply.

The case referred to is one in which words uttered by the prisoner in pleading, which had been recorded as a plea of not guilty, had been referred to by the trial judge. The following passage appears in the judgment, at p. 397:

“With deference we think that this reference to the words used by the prisoner when called on to plead was certainly improper. Technically, these remarks were not made before a properly constituted court for the plea is taken prior to the empanelling of the jury or, as in the instant case, the selection of the assessors. Indeed we think that if the court decides to enter a plea of not guilty the better course is merely to record the plea in those words and not to record the prisoner’s actual words. This practice seems to be what is contemplated by s. 274 of the Criminal Procedure Code. And see *Byarufu s/o Gafa v. R.* (1950), 17 E.A.C.A. 125 at p. 126. It is only when a plea of ‘guilty’ is entered that there is any obligation to record as nearly as possible the words used by the accused when admitting the truth of the charge.”

This authority amply justifies the learned judge’s approach and the difficulty which arose in this case is largely due to the use of a set form leaving spaces to be filled in by the judge. It would have been better, we think, if the words “Not guilty” had been inserted after the word “Plea”.

The next matter for comment is that the record indicates that the Director of Public Prosecutions during the course of the trial asked:

“... if the defence will concede that accused stabbed another person besides deceased.”

The advocate for the defence is recorded as agreeing. Apart from the fact that the ambiguous words used might be construed as meaning that the admission went to the stabbing of the deceased as well as another we find this an unusual procedure and one which, though it caused no injustice in the present case, ought not to be adopted. We assume that reliance was placed on s. 58 of the Indian Evidence Act which is as follows:

“58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing,

they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

“Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

In the commentary on this section in Sarkar on Evidence (10th Edn.), pp. 534 – 6 there are many cases quoted and there are indications of a difference of opinion between writers as to whether the section applies to criminal as well as civil cases. The question has not been argued before us and we need go no further than say that if, in the absence of any distinction drawn on the section itself, it properly applies to criminal proceedings, it is desirable that the proviso be applied strictly so as to ensure that all relevant facts are strictly proved by evidence in the usual way. In the present case the evidence called did include the stabbing of Yusufu, which was part of the *res gestae*, and we quite fail to see what useful purpose was served in asking for an admission, which, if it had stood alone must have confused, rather than assisted, the court.

There is a further matter relating to the evidence. The doctor who operated on the deceased and performed the post-mortem examination gave evidence that the body “was identified by two persons in the presence of askari”. A report prepared at the time was read and indicates that the two persons were Abdalla Selemani and Hassani Kayonjo, and the askari “A. 3056 P.C. Adams”. Neither Abdalla Selemani nor Hassani Kayonjo, was called as a witness and the prosecution would have failed altogether to prove the death of the victim of the stabbing were it not for the evidence of Damas s/o Johannes, a police constable who took the unconscious victim from the scene of the crime and later went to the hospital and “Identified the body as that of the person I had brought in”. Two exhibits identified by P.C. Damas show his number as A. 3056, which sufficiently identifies him with the “P.C. Adams” mentioned in the post-mortem report. No point on this was raised at the trial and the learned judge was justified in accepting the evidence of P.C. Damas as sufficient to link the medical evidence with the person named in the charge as having been murdered. Nevertheless, we cannot, without explanation, regard the prosecution’s approach to the question of identification as satisfactory.

We come now to the questions which arise on the merits of the appeal. The assessors gave their opinions as follows:

“1st Assessor: We have heard the evidence of the doctor that the accused was taken into the presence of the deceased when he was in his senses. My opinion is that the accused did not intend to kill. When the accused found that so many persons were pursuing him, he found that he had better defend himself by using that weapon.

“2nd Assessor: I am of the opinion that the accused killed intentionally. There was no reason to use such a weapon, a knife, which he knows is a fatal weapon. As far as the doctor’s evidence is concerned, he says that the wound was caused with a knife, and I agree.”

We find difficulty in knowing what the assessors meant by those opinions. The first might possibly have intended to say that the appellant was not guilty and the second that he was. Either might have intended to indicate that excessive force was used in self-defence which would result in a verdict of manslaughter. The learned judge had not put specific questions to the assessors and therefore presumably had asked each assessor to state his opinion as to the case generally as required by s. 283 (1) of the Criminal Procedure Code. We think it desirable, as a matter of practice, that in addition to any other answers which may be given, each assessor should state specifically whether he considers the accused

person to be guilty or not guilty on each count on which he is required to state his opinion.

In his judgment the learned judge said that the basis of the defence amounted to an assertion that the appellant killed in self-defence and continued:

“Self-defence may excuse killing where the accused reasonably believes his life is in imminent danger where he is unable to escape and where he uses no more force than is reasonably necessary in the circumstances. Where the other conditions are satisfied but the degree of force used is excessive, the offence may be reduced to the lesser one of manslaughter.

“Applying those principles to the present case in relation to the facts found, it may be said in the accused’s favour that he did at first attempt to run away. It may also reasonably be supposed that he was in a state of fear. It is common knowledge, sufficiently, I think, to be within the judicial knowledge of the court, that villagers in Tanganyika who apprehend a suspected thief by night do not infrequently beat him severely. I do not think, however, that it can properly be said that the accused was in imminent danger when he used the knife. He was at that time only being pursued by three persons, two of whom, those he struck, were certainly unarmed. The witnesses said that so far as they were aware, no one had beaten the accused and certainly there is no evidence before the court of any manifest intention other than to apprehend the accused. I hold, therefore, that the accused was not acting in self-defence, so as to excuse or reduce his offence.”

The first part of that passage contains a direction on the question of self-defence in rather general terms. By s. 18 of the Penal Code of Tanganyika, subject to any other express provisions of the Code or any other law criminal responsibility for the use of force in the defence of person or property “shall be determined according to the principles of English law”. Under English law there is a broad distinction made where questions of self-defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance or disengagement would be relevant to the question of reasonable necessity for the killing. In other cases of self-defence where no violent felony is attempted, a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise to break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter: *R. v. Biggin* (2), 14 Cr. App. R. 87; *R. v. Howe* (3) (1958), 32 Australian Law Journal Reports 212, quoted in Current Law Yearbook, 1958, No. 761; *Marawa s/o Robi v. R.* (4), [1959] E.A. 660 (C.A.) (in relation to defence of property). It is probable that the learned judge in giving his direction had in mind the type of self-defence secondly referred to above, but on his findings of fact no question of self-defence of any kind can arise.

As we read the passage from the judgment quoted above the extent of the learned judge’s findings in favour of the appellant was that he was in a state of fear and might anticipate a severe beating if caught. He found that it could not properly be said that he was in imminent danger when he used the knife, that neither of his immediate pursuers was armed, that there was evidence that he

had not been beaten and no evidence of any manifest intention other than to apprehend him. These findings we consider fully support the learned judge's decision that the appellant was not acting in self-defence. There is evidence that a felony had in fact been committed and under s. 32 (1) of the Criminal Procedure Code any private person may arrest any person whom he reasonably suspects of having committed a felony. Though there was no finding on this point in the court below, the flight of the appellant on the alarm being raised provided abundant cause for such reasonable suspicion. The appellant was aware of the intention to arrest him as he said in his unsworn statement in court that people thought he was the thief. The pursuers were performing a lawful act in endeavouring to arrest the appellant and no question of provocation can arise (Penal Code, s. 202). It could be otherwise if the arrest were unlawful. It would be opening a very wide door indeed to hold that by reason of a known tendency of villagers to beat suspected thieves such a person might justifiably or excusably stab and kill a pursuer. Such a proposition has already been rejected by this court in *R. v. Berezeri Kayongo* (5) (1943), 10 E.A.C.A. 116, the first two paragraphs of the headnote being as follows:

“(1) When a person has without legal excuse or justification violently assaulted another person, his apprehensions, as to what is likely to happen to him on his being arrested cannot be accepted in a Criminal Court as a justification for killing or violently assaulting those who are engaged in the duty of lawfully arresting him.

“(2) Upon the facts before the judge the appellant should have been convicted of murder.”

In the present case on the learned judge's findings of fact the appellant stabbed the deceased prior to his arrest and the appellant had not up to that stage been beaten – it is therefore not a case in which the deceased had forfeited the status of a person effecting a lawful arrest. There was no right in the appellant to use any force at all and therefore no question of excessive force, or of manslaughter on any such basis, arises.

For these reasons we consider that the conviction should be sustained and the appeal is accordingly dismissed.

*Appeal dismissed.*

The appellant did not appear and was not represented.

For the respondent:

*TW Lane* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

**Chebusit A'Kalia v R**  
**[1963] 1 EA 448 (SCK)**

|                          |                                   |
|--------------------------|-----------------------------------|
| <b>Division:</b>         | Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 25 September 1961                 |
| <b>Case Number:</b>      | 63/1961 (Kisumu)                  |
| <b>Before:</b>           | Rudd Ag CJ, MacDuff and Madan JJ  |

*[1] Criminal law – Evidence – Burden of proof – Stock theft – Burden of proof placed on accused by law – What must be established by prosecution before calling upon accused for proof of lawful possession – Quantum of proof required – Stock and Produce Theft Ordinance (Cap. 206), as amended by Ordinance No. 4 of 1959, s. 10 (K.) – Penal Code (Cap. 24), s. 276, s. 279, s. 318, s. 323 and s. 324 (K.).*

### **Editor's Summary**

The appellant was charged before a magistrate with possession in a proclaimed district of stock suspected of being stolen contra s. 10 (1) of the Stock and Produce Theft Ordinance as amended by Ordinance No. 4 of 1959. The appellant was found in possession of three head of stolen cattle and his explanation to the owner and later to the magistrate, was that he had exchanged with two Masai two bulls owned by him for two bulls and a cow as he wanted the bulls for work oxen and the cow for milking, that the animals had Siria T9A brands and ordinary Masai brands so that he did not think there was anything wrong or that the cattle were stolen. The trial magistrate rejected the appellant's story and convicted him. On appeal the substantial points argued were (a) what is required to be proved by the prosecution before an accused person can be called on to establish his lawful possession to the satisfaction of the court, and (b) the nature and extent of the onus of proof placed on an accused by the sub-section and (c) whether, when the prosecution were in possession of evidence that the stock found in the appellant's possession had been stolen, it was proper to charge him under s. 10 (1) *ibid.* or whether he should more properly have been charged with stock theft or receiving stock knowing it to have been stolen under s. 279 or s. 323 respectively of the Penal Code. Under s. 10 (1) *ibid.* any person who has in his possession in a proclaimed district "any stock which may be reasonably suspected of being stolen or unlawfully obtained" may, if he fails to prove to the satisfaction of the court that he came by the stock lawfully, be convicted of an offence.

### **Held –**

- (i) before an accused person can be called on to establish his lawful possession to the satisfaction of the court the prosecution would have to prove, firstly, possession of the stock, secondly, that such possession was in a proclaimed district, and thirdly, that such cattle were reasonably suspected of having been stolen or unlawfully obtained, and proof that the cattle had in fact been stolen would satisfy this last requirement.
- (ii) a person can only be convicted under s. 10 (1) of the Stock and Produce Theft Ordinance as amended if he fails to show that no offence was committed in respect of his acquisition of the stock.
- (iii) in general, if the prosecution is able to prove the ownership of the stock found, then a charge of theft or receiving should lie, but there may be circumstances which may militate against the bringing of such a charge under the Penal Code.
- (iv) some of the magistrate's conclusions were based on answers given by the appellant in reply to questions which the magistrate had no right to ask, and had those answers not influenced his mind and had he applied his mind properly



to the standard of proof required, the court was unable to say that he must necessarily have come to the same conclusion and convicted the appellant.

Appeal allowed. Conviction and sentence quashed.

### Cases referred to in judgment:

- (1) *R. v. Kimuge arap Ngelenu* (1939), 18 K.L.R. 153.
- (2) *R. v. Kipsoi arap Soiyot* (1941), 19 K.L.R. 89.
- (3) *Mikael Njuguna Gachuhi and Another v. R.*, Kenya Supreme Court Criminal Appeals Nos. 944 and 945 of 1959 (unreported).
- (4) *R. v. Carr-Briant*, [1943] K.B. 607; [1943] 2 All E.R. 165.
- (5) *Ali Ahmed Saleh Amgara v. R.*, [1959] E.A. 654 (C.A.).
- (6) *R. v. Mohanlal Ramji Popat*, [1961] E.A. 263 (C.A.).
- (7) *Threlkeld v. Smith*, [1901] 2 K.B. 531.

### Judgment

**Rudd Ag CJ:** read the following judgment of the court: The appellant was charged before the magistrate, first class, Kilgoris, with –

“Charge: Possession suspected stolen stock in a proclaimed district, vide Proclamation No. 105 of 1933 contrary to s. 10 (1) of the Stock and Produce Theft Ordinance (Cap. 206, Laws of Kenya, 1948), as amended by Ordinance No. 4 of 1959.

“Particulars – *Chebusit Arap Karia*: During the month of March, 1961, at Lengat Barigoi in the Narok district of the Southern Province, the said district being a proclaimed district, you were unlawfully found in possession of two head of cattle the stock reasonably suspected of having been stolen”,

was convicted and sentenced to serve a term of eighteen months’ imprisonment. He has now appealed against conviction and sentence.

The facts out of which the charge arose were briefly as follows. On January 1, 1961, about one hundred head of cattle, belonging to three Masai, were stolen from Marti in Trans-Mara. The theft was reported to the police. In March, 1961, a tribal policeman, Kitule ole Langas, while on patrol in the Angata Barigoi area, saw three of the stolen cattle, which he recognised as being the property of one of the Masai, Leteiba ole Letoo, in the herd of the appellant. He reported this to Leteiba ole Letoo and went with him to inspect the appellant’s herd when Leteiba ole Letoo identified two of the cattle, a black cow and a white bull, as having been amongst the cattle, stolen from him in January.

The appellant’s explanation of how he acquired these cattle given at the time to Leteiba ole Letoo and later to the magistrate was that about February/March he had exchanged two bulls owned by him with two Masai, Mosoito ole Kimpei and Lengoti ole Tema, for three cattle, two bulls and a cow, as he wanted the bulls for work oxen and the cow for milking. At the time he noticed that the animals had Siria T9A brands and ordinary Masai brands so he did not think there was anything wrong or that the cattle were stolen. This story was corroborated by two witnesses called by the appellant. This story the magistrate

appears to have disbelieved.

The appeal, in view of the conviction of the appellant, despite the evidence called by him, and in view of a recent amendment of s. 10 (1) of the Stock and Produce Theft Ordinance (Cap. 206 of the Laws of Kenya), raises a number of interesting points. The original wording of the sub-section was as follows:

“10(1) If any stock is found in the possession or on the premises of any person in a proclaimed district in circumstances which may reasonably

lead to the belief that such stock has been stolen, such person shall be deemed to have stolen the same and shall, unless he proves affirmatively (the onus being on him) that the possession was lawful be liable to the penalties prescribed for theft”.

This was amended by Ordinance No. 4 of 1959 to read –

“10(1) Any person who has in his possession in a proclaimed district any stock which may be reasonably suspected of being stolen or unlawfully obtained shall if he fails to prove to the satisfaction of the court that he came by the stock lawfully, be guilty of an offence and liable on conviction to the penalties prescribed for theft”.

There are a number of decisions of this court dealing with the interpretation of the original sub-section, to some only of which it will be necessary for us to refer.

The first point for consideration is what is required to be proved by the prosecution before an accused person can be called on to establish his lawful possession to the satisfaction of the court. In *R. v. Kimuge arap Ngeleu* (1) (1939), 18 K.L.R. 153, dealing with s. 10 of the Stock and Produce Theft (Levy of Fines) Ordinance, 1933, this court held that the three ingredients required to be established were firstly possession, secondly that the possession or the premises on which the stock was found must be in a proclaimed district, and, thirdly, that the finding must be in circumstances which may reasonably lead to the belief that such stock had been stolen, that is to say that a reasonable man would entertain such a belief. This authority was followed in a number of cases decided under the provisions of the original sub-section. In *R. v. Kipsoi arap Soiyot* (2) (1941), 19 K.L.R. 89, however, this court expressed the view that the mere fact that cattle found in an accused’s possession were later found to be stolen was insufficient of itself to satisfy the third of the above requirements.

It would appear, however, that the amendments effected by the 1959 Ordinance have, to some extent, nullified those decisions. In the first place the legislature has changed the original wording from

“If any stock is found . . . in circumstances which may reasonably lead to the belief that such stock has been stolen”

to

“Any person who has in his possession any stock which may be reasonably suspected of being stolen or unlawfully obtained”.

It thus appears that the legislature intended by the amendment in 1959 to modify the requirement that the circumstances which may reasonably lead to the belief that the stock in question had been stolen must relate to the circumstances in which the stock was found in the possession of the accused as was decided in the case of *Kipsoi arap Soiyot* (2). The effect of the recent amendment is that a person charged with an offence under the section may be required to show that he came by the stock lawfully whenever the prosecution proves that he was in possession of stock in a proclaimed area and that there is reasonable cause for suspecting that such stock had been stolen. In fine since the amendment the circumstances raising such a reasonable suspicion need not any longer relate to the circumstances in which the stock was found in the possession of the appellant. It therefore follows that any satisfactory evidence that the stock had actually been stolen would satisfy this particular requirement of the offence and the view expressed by the court in *Kipsoi’s* case (2) is not now good law.

The elements under the sub-section as now amended which require to be proved by a prosecution would be firstly possession of the stock, secondly that such possession is in a proclaimed district, and, thirdly that such cattle are

reasonably suspected of having been stolen or unlawfully obtained and proof that the cattle had in fact been stolen would satisfy this last requirement.

During the original hearing of this charge it became apparent that prior to any charge being laid the prosecution were in possession of evidence that the stock found in the appellant's possession had been stolen. The question was therefore canvassed as to whether in those circumstances it was proper to charge an accused under s. 10 (1) of the Stock and Produce Theft Ordinance or whether he should more properly have been charged with "stock theft contrary to s. 279 of the Penal Code" or in the alternative "Receiving stock knowing it to have been stolen contrary to s. 323 of the Penal Code". It should be borne in mind that in either charge under the Penal Code there is no onus on an accused, as there is in a charge under s. 10 (1) of the Stock and Produce Theft Ordinance, to prove to the satisfaction of the court that he came by the stock lawfully but only to raise a reasonable doubt as to whether he stole the stock or in the alternative received it knowing or having reason to believe that it was stolen.

We take the view that the question in relation to s. 10 (1) of the Stock and Produce Theft Ordinance is analogous to that which pertains in respect of s. 324 of the Penal Code which reads:

"324. Any person who has been detained as a result of the exercise of the powers conferred by s. 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour",

and theft contrary to s. 276 of the Penal Code or receiving stolen property contrary to s. 323 of the Penal Code. In *Mikael Njuguna Gachuhi and Another v. R.* (3), Kenya Supreme Court Criminal Appeals Nos. 944 and 945 of 1959 (unreported), in considering a conviction of an offence contrary to s. 318 of the Penal Code (now s. 324 quoted *supra*) this court said:

"It appeared, however, that the magistrate was satisfied on the evidence that the property which was found in the appellants' possession was the property of the Bata Shoe Company. We therefore asked the deputy public prosecutor to argue the question whether the convictions under s. 318 were, in the circumstances, good in law. After hearing him we came to the conclusion that the convictions were good and we now give our reasons for that conclusion.

"Section 318 of the Penal Code applies when a person (who has been detained under the powers conferred by s. 25 of the Criminal Procedure Code) is charged with having in his possession or conveying anything which may be reasonably suspected of having been stolen or unlawfully obtained. A charge should not be preferred under s. 318 in the case of property, found in the possession of a person detained under s. 25, which can be identified as that of a known individual. Where the prosecution is in a position to prove ownership of the property in question, the charge should be laid under one of the sections of the Penal Code dealing with stealing or receiving.

"If, however, in the course of a trial in which a person is charged under s. 318, the property is proved to belong to a known person, that does not, in our opinion, mean that the charge must fail for that reason. In those circumstances, provided that it is proved that the property in question had been stolen and that the person charged either stole it or received it knowing it to have been stolen, in our opinion a conviction can be had under the section . . .

“We would suggest that, when in the course of the hearing of a charge under s. 318, it appears on the evidence that the property has been identified as the property of an individual which has been stolen, consideration should be given to the withdrawal of that charge and its replacement by one laid under an appropriate section of the Penal Code dealing with stealing or receiving.”

“In the present case the property was proved to have been the property of an individual and to have been stolen. In addition it was proved that the appellants had stolen the property or had received it knowing it to have been stolen. In those circumstances we were of opinion that the convictions under s. 318 were good in law.”

We would adopt that reasoning as applying to the present case. In general if the prosecution is able to prove the ownership of the cattle found then a charge of theft or receiving should lie. However we appreciate that there are difficulties inherent in the circumstances attendant on theft of cattle in the pastoral regions of this colony, for example time, distance and the drifting of stolen stock through a number of hands, which may militate against the bringing of a charge under the relative section of the Penal Code and which would make a charge under the Stock and Produce Theft Ordinance more appropriate and we should not be taken to fetter the discretion of a prosecution in bringing the charge it considers to be more appropriate to the circumstances of each particular case.

We turn next to the nature and extent of the onus of proof placed on an accused by the sub-section. Once the prosecution has established that the stock may be reasonably suspected of having been stolen or unlawfully obtained, to avoid liability the accused is required to prove to the satisfaction of the court that he came by the stock lawfully. What is the standard of proof required to satisfy a court? This standard is clearly settled by two decisions of the Court of Appeal for Eastern Africa which adopted the statement of law laid down in *R. v. Carr-Briant* (4), [1943] K.B. 607. *Ali Ahmed Saleh Amgara v. R.* (5), [1959] E.A. 654 (C.A.), was a case on s. 167 (b) of the East African Customs Management Act, 1952, whereby the onus of proving lawful importation was cast upon the person prosecuted. An extract from the judgment at p. 658 reads:

“Where, as in the instant case, there is a specific provision in a statute placing the burden of proof regarding a particular matter on the person accused, there is no need for the prosecution to rely upon s. 105 of the Indian Evidence Act and we think that the application of that section must be excluded, even though it would otherwise have been applicable, and that the principles of English law would apply. Nevertheless, even if it might be thought that by analogy the degree of the burden on the accused should be drawn from s. 105, we do not think that there is any material difference between s. 105 of the Indian Evidence Act and the English law on the point. The position under English law is stated in Phipson on Evidence (9th Edn.) at p. 38 as follows:

‘When, however, the burden of an issue is upon the accused, he is not in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeed in proving a *prima facie* case, for then the burden is shifted to the prosecution, which has still to discharge its original onus that never shifts, i.e. that of establishing, on the whole case, guilt beyond a reasonable doubt.’

“We accept that statement of the law. In *R. v. Carr-Briant*, [1943] K.B. 607, which is one of the cases cited in Phipson in support of the proposition just stated (and is also cited in the commentary on s. 105 of the Indian

Evidence Act in Sarkar on Evidence (9th Edn.) at p. 808), the Court of Criminal Appeal said, at p. 612:

‘In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person “unless the contrary is proved”, the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at . . .

‘. . . the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.’

“We would respectfully agree with this view . . . It still, of course, remains for the court to be satisfied beyond reasonable doubt as to the guilt of the accused on the whole of the evidence and this, in substance, is all that is enacted by the second proviso to s. 105 of the Indian Evidence Act.

“We think that these principles apply to the present case.”

In *R. v. Mohanlal Ramji Popat* (6), [1961] E.A. 263 (C.A.), a case under s. 137 (1) (i) of the Bankruptcy Ordinance (Cap. 30 of the Laws of Kenya) which throws on a debtor the burden of showing that at the time he contracted a debt he had reasonable or probable grounds of expectation of being able to pay it the same principles were applied. In our view these principles also apply to the present case. It is for an accused to establish on balance of probabilities *prima facie* that he came by the stock lawfully.

The decision under the original section in *R. v. Kimuge arap Ngelenu* (1) that the

“onus is on an accused person to prove affirmatively that his possession is lawful and in order to discharge that onus he has to prove that his possession was with the authority or consent of the owner or his authorised agent”,

was followed and applied up to the time of the amendment in 1959. It is, however, true to say that the result of this construction in more recent years at least occasioned some anxiety amongst judges and others who felt that the onus was unduly harsh and that if it were shown that there was a real probability that the accused’s possession of stock was innocent and not in contravention of any specific provision of the Ordinance or the criminal law he should not be convicted of an offence. It was in such circumstances that the legislature enacted the amendment of 1959 and changed the expression of the onus upon an accused which formerly was to prove that “his possession was lawful” to an onus to prove that he “came by the stock lawfully”.

It has therefore to be considered what is now meant by the expression “that he came by the stock lawfully”. On the mere wording of the amendment the difference between the two onuses may certainly be a fine one. Indeed it would be possible to construe the amendment as meaning very much the same thing as requiring the accused to prove that his possession was lawful. It is, however, a sound and recognised rule of drafting that an established form of words which has been interpreted judicially should not be altered unless it is intended to change the meaning or some other reason is apparent. If there was no intention to change the extent of the burden of proof as established in *R. v. Kimuge arap Ngelenu* (1), then there would have been no object in altering the expression of the onus cast by the section as was done when the section was amended. Why then did the legislature adopt the formula “that he came by the stock lawfully”?

The learned deputy public prosecutor conceded that the legislature did not intend that an accused was required to prove that he came into possession of the stock with the authority or consent of the owner or his authorised agent. This would, in effect, mean an absolute prohibition against being in possession of stock which may be proved to have been stolen and would override the ordinary requirement of criminal law that before a person can be punished he must be shown to have a criminal intent. In the circumstances it is reasonable to suppose that the legislature intended to alter the onus upon an accused person under the section so that he would be entitled to acquittal if he could show that he came by the stock innocently with no knowledge or reason to believe that it had been stolen and in circumstances which did not amount to any offence.

Under s. 14 of the Larceny Act, 1861, any person, taken before a justice of the peace having been found in possession of any deer or the head, skin or other part thereof, who failed to satisfy the justice that he “came lawfully by” such deer or the head, skin or other part thereof was liable to conviction and fine. In *Threlkeld v. Smith* (7), [1901] 2 K.B. 531, it was held that the section was intended to apply only to a person who was in possession of any part of a deer and could not show that an offence had not been committed in respect thereof and that it did not apply where the deer had been killed merely in contravention of the rights of a private individual and not in contravention of the criminal law of the land or contrary to the other provisions of the statute.

In our opinion a similar interpretation should be applied to s. 10 of the Ordinance as amended, that is to say that a person in possession in a proclaimed district of any stock which is reasonably suspected of having been stolen or unlawfully obtained can only be convicted under the section if he fails to show that no offence was committed in respect of his acquisition of the stock.

Turning now to the proceedings at the trial the record shows that after the appellant had made an unsworn statement and had called his two witnesses the magistrate proceeded to question the appellant at some length. He then gave his judgment as follows:

“The particular law under which the accused is charged with possession places the onus on the accused to show how he had come lawfully into possession of the stolen stock. The accused and his witnesses have told a consistent tale of exchange of cattle. So far so good. The court is not however satisfied about the truth of this story. It is a possible explanation but is it the probable one? The accused admits to have known the two men who exchanged this stolen stock with him. On his statement it is clear that they at any rate knew the stock was stolen or had stolen it themselves. He is unable to bring them as his witnesses. It appears they live at or near the Oleashadi quarantine area. This is some ten miles or so from Angata Barigoi. It is a little surprising that the accused should not have been better acquainted with their stock. These are major flaws in the court’s opinion of the explanation offered by accused and the court is unable to accept this explanation as true.”

A number of the magistrate’s conclusions are based on the answers given by the appellant in reply to questions the magistrate had no right to ask. Had those answers not influenced the magistrate’s mind, and had he applied his mind properly to the standard of proof required from an accused, we are unable to say that he must necessarily have come to the same conclusion and convicted the appellant. For that reason the appeal must be allowed and the conviction and sentence quashed. The appellant is to be set at liberty forthwith.

*Appeal allowed. Conviction and sentence quashed.*

The appellant did not appear and was not represented.



For the respondent:

*JP Webber* (Deputy Director of Public Prosecutions, Kenya)

*The Attorney-General, Kenya*

**Wampwewo Service Station v Italian Garage (Pizzandi) Ltd**  
[1963] 1 EA 455 (HCU)

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 27 September 1963

**Case Number:** 70/1963

**Before:** Jones J

**Sourced by:** LawAfrica

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[1] *Execution – Attachment of goods – Distress for rent levied on goods subject to attachment – Goods sold by court bailiff – Goods sold under warrant of sale issued by court – Proceeds of sale deposited in court – Priority – Whether landlord has priority for arrears of rent over judgment-creditor’s claim – Distress for Rents (Bailiffs) Ordinance (Cap. 116) (U.) – Judicature Ordinance, 1962, s. 2 (b) (i) (U.) – Statute of 8 Anne, c. 14, s. 1 (U.K.).*

[2] *Practice – Execution – Attachment of goods – Distress for rent levied on goods subject to attachment – Goods sold under warrant of sale issued by court – Proceeds of sale deposited in court – Application by landlord claiming priority for arrears of rent – Whether application competent – Civil Procedure Ordinance (Cap. 6), s. 101 (U.).*

[3] *Distress – Arrears of rent – Distress levied on goods subject to attachment – Goods attached previously under court order – Goods attached for judgment debt – Goods removed and advertised for sale by bailiff levying distress – Procedure to be followed by landlord and bailiff levying distress – Procedure to be followed by landlord and bailiff levying distress when goods already attached – Court Brokers Rules, 1956, r. 3 (U.) – Courts (Rules) Ordinance, 1956 (U.) – Distress for Rents (Bailiffs) Ordinance (Cap. 116) (U.).*

### **Editor’s Summary**

The plaintiff sued the defendant for the price of goods sold and delivered and pending the hearing obtained an order for attachment of several vehicles owned by the defendant including one, UFM. 421. Judgment having been given for the plaintiff, the court made an order for execution and a court bailiff was instructed to levy distress upon the property of the defendant. Thereupon the defendant’s landlord instructed another court bailiff to levy distress on UFM. 421 for four month’s arrears of rent which led to a reference to the registrar for a ruling. The registrar ruled that the first bailiff who had been instructed should execute the warrant of sale and that the distress for rent should be lifted. The vehicle was thus sold and the proceeds paid into court by the bailiff. The landlord then applied to the court claiming that he had priority over the judgment-creditor’s claim and sought an order that he be paid his arrears of rent



out of the sum in court. For the plaintiff a preliminary point was taken that the applicant had no locus standi in these proceedings as he was not a party to the action brought by the plaintiff.

**Held –**

- (i) by virtue of s. 2 (b) (i) of the Judicature Ordinance, 1962, the law applicable to distress in Uganda is the common law and the statute of general application on this subject in force in England on August 11, 1902.
- (ii) as the statute of 8 Anne, c. 14, was not a private or a local Act it was an Act of general application in Uganda within the meaning of s. 2 of the Judicature Ordinance, 1962.
- (iii) the deputy registrar was correct in ordering the lifting of the landlord's distress for rent but was wrong in ordering the sale of the defendant's vehicle under the court's warrant of execution.
- (iv) it was wrong of the landlord to instruct the court bailiff to distrain for arrears of rent when the property was in custodia legis and protected from seizure from him; further the bailiff ought not to have removed the defendant's property but should have requested the plaintiff to pay the arrears of rent. *Re MacKenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q.B. 566, applied.

- (v) as the bailiff had paid the proceeds of sale of the vehicle into court, the landlord was entitled to move the court for an order for payment of his claim for arrears of rent out of proceeds, instead of bringing an action against the bailiff, and accordingly the preliminary point that the landlord had no locus standi had no merit.
- (vi) the landlord was entitled to priority for the arrears of rent claimed over the plaintiff's claim.

*Re MacKenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q.B. 566, applied.

Preliminary objection dismissed.

### Cases referred to in judgment:

(1) *Re MacKenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q.B. 566; [1895 – 1899] All E.R. Rep. 1290.

(2) *Karimjee Jivanjee & Co. v. The Official Receiver of the Government of Tanganyika* (1936), 3 E.A.C.A. 94.

### Judgment

**Jones J:** Wampewo Service Station sued the defendant, Italian Garage (Pizzardi) Limited for Shs. 11,417/75, for goods sold and delivered. The suit was filed on February 12, 1963.

On February 21, 1963, the plaintiffs applied to the court and obtained an order for attachment on several vehicles, including one UFM. 421, owned by the defendant.

Notice was filed on the defendant to show cause why the attachment should not continue. He did not appear before the court, so the order was made absolute.

Later, the plaintiff obtained an *ex parte* judgment against the defendant.

The defendant later applied to the court to set aside the *ex parte* judgment. That was dismissed with costs by Sheridan, J., on March 12, 1963.

Following on this, a director of the defendant company lodged objection proceedings, claiming ownership of UFM. 421. This was dismissed on May 21, 1963.

An order for execution was made by this court, and a Mr. Khan, a court bailiff, was instructed to levy distress on the defendant's property.

As soon as this was done, Taherali Amiji, the defendant's landlord, decided to levy distress for four months' arrears of rent amounting to Shs. 2,200/-, purporting to be due for the months of February, 1963, to May, 1963. He instructed a Mr. Naseer, also a court bailiff, to levy distress on the same vehicle, UFM. 421. He in fact advertised the sale to take place on June 4, 1963.

Naseer purported to act under paras. 7, 10, 11 and 12 of instructions issued by the registrar of the High Court in his administrative capacity. The registrar very properly said in the first paragraph of his instructions that they were not to be regarded as an authoritative statement of the law.

The matter was referred to the registrar for a ruling, presumably by virtue of r. 3 of the Court Brokers Rules, 1956, promulgated under the Courts (Rules) Ordinance, 1956, Legal Notice 146 of 1956.

The deputy registrar, in a letter dated June 1, 1963, to Naseer, said this:

“In the result, I order that Mr. Khan, plaintiff’s auctioneer, proceeds to execute the warrant of sale, and to break open the outer door of the

premises where the motor vehicle is being kept. Mr. Naseer's advertisement for sale on June 4, 1963, is therefore declared null and void."

Khan proceeded to sell the vehicle after this "ruling" and paid the money into court.

This matter came before me on a notice of motion by the landlord, claiming that he had a priority over the judgment-creditor's claim and sought an order that he be paid Shs. 2,200/- plus costs out of the sum in court.

The applicant must have thought I was clairvoyant, as he did not specify under what order or rule, the court was being moved. His advocate did condescend to inform me, however, that he was relying on s. 101 of the Civil Procedure Ordinance (Cap. 6), i.e., under the inherent powers of the court, to achieve his ends.

Mr. Ishani, for the plaintiff, took a preliminary point that the applicant had no locus standi in these proceedings as he was not a party to the action brought by the plaintiffs.

As far as I can find out, the rights of a landlord, assuming he has rent due and owing to him, in the circumstances outlined above, have not been adjudicated on in Uganda or indeed in East Africa.

As this motion raises a point of some importance, especially to court bailiffs who appear to be uncertain of their rights and powers, I have decided to go into this matter fully and deal with the law pertinent on this question.

No authorities were cited to me. From my research, there is only one Ordinance dealing with distress for rents extant in Uganda, i.e., the Distress for Rents (Bailiffs) Ordinance (Cap. 116 of the Laws of Uganda). That deals with the appointment of bailiffs, the cancellations of their certificates and penalties for acting without certificates.

Court Brokers Rules were promulgated under the Courts (Rules) Ordinance of 1956, but they merely elaborate on the subjects dealt with in the Distress for Rents (Bailiffs) Ordinance (Cap. 116).

The law applicable to distress would therefore appear to be, by virtue of s. 2 (b) (i) of the Judicature Ordinance, 1962, the common law and the statutes of general application in force in England on August 11, 1902, on this subject:

Halsbury's Laws of England (3rd Edn.), Vol. 12, at p. 137, states:

- "(1) The levying of an execution upon any goods of a tenant places them in custodia legis and protects them from seizure by the landlord.
- "(2) In general, goods seized by the sheriff under an execution in the High Court cannot be removed until any arrears of rent (not exceeding one year) have been paid by the execution creditor."

From para. (1) of the above, the deputy registrar was correct in ordering the lifting of Naseer's distress in his letter of June 1, 1963, but not correct, from para. (2), in ordering Khan to sell the debtor's goods under the court's warrant of execution.

The whole question of the landlord's rights for rent was dealt with in the case of *Re MacKenzie, Ex parte Sheriff of Hertfordshire* (1), [1899] 2 Q. B. 566. I quote the headnote in extenso:

"Where under an execution the sheriff sells the goods of the judgment debtor, and subsequently, under s. 11 of the Bankruptcy Act, 1890, receives from the official receiver notice of bankruptcy proceedings commenced against the debtors since the sale, together with a demand for payment of the proceeds of sale, he is entitled to retain out of the proceeds and pay the

landlord of the premises on which the execution was levied any arrears of rent due to him from the debtor, not exceeding the amount of one year's rent, even though he, the sheriff, has not received notice of the landlord's claim until after the sale, and notwithstanding that the sale has deprived the landlord of the lien given him on the goods themselves by s. 1 of 8 Anne, c. 14 (c. 18 in Revised Statutes).

"The right of the landlord to be paid out of the proceeds of sale in the hands of the sheriff, where no bankruptcy intervenes – a right established by the practice uniformly adopted under the statute of Anne and recognised by judicial authority long before the present law of bankruptcy – is not affected by s. 11 of the Bankruptcy Act, 1890. The expression 'the goods of a debtor' in that section does not include the goods of a judgment debtor, which are by the statute of Anne impounded until the landlord is paid; nor are the proceeds of sale of those goods to be handed by the sheriff to the trustee in bankruptcy under that section free from the right of the landlord, sanctioned by long practice, or of the sheriff for his own indemnity."

Lindley, M.R., dealt, in his judgment, with the rights of a landlord where property belonging to his tenant is the subject of a distress by order of a court, under three headings. I am only concerned in this case with his judgment on the second head, i.e., the rights of a landlord against a sheriff (in this country the court bailiff) when tenants' goods have been seized by him, when there is no bankruptcy. As he dealt with the subject in a most exhaustive manner, I can do no better than to quote also almost in extenso his words in this connection at p. 574 et seq.:

"... This statute [8 Anne, c. 14] did not give the landlord a right to distrain, but it prohibited the removal of the goods seized by the sheriff until the landlord's rent in arrear (not exceeding one year's rent) had been paid by the execution creditor ... But if the sheriff had notice before the goods were removed that rent was due to the landlord, and the sheriff, nevertheless, did not keep the goods on the premises, but sold them without paying the landlord, the sheriff was liable to an action by the landlord for the wrongful removal – *Riseley v. Ryle* (1843), 11 M. & W. 16; *Andrews v. Dixon* (1820), 3 B. & Ald. 645; *Colyer v. Speer* (1820), 2 Brod. & Bing 67. The Act in effect impounded the goods for the landlord's benefit; they could not be removed until he was paid. To this extent the Act in terms gave him a right to have them preserved as a security for one year's arrears due to him. He could not, however, require them to be sold for his benefit; and if they were sold he could not maintain an action against the sheriff for money had and received: *Green v. Austin* (1812), 3 Camp. 260. His remedy was by an action on the statute for wrongful removal without paying him: see a form of declaration, 2 Chitty's Pleadings, 629. If the execution creditor chose to pay the landlord, the goods were sold by the sheriff, and he applied the proceeds in paying his own expenses and the judgment debt and the amount paid by the execution creditor to the landlord for the rent in arrear. The Act itself authorised this.

"But unless the execution creditor or the tenant paid the landlord his rent in arrear (not exceeding one year's arrears), the Act might produce a deadlock. If the sheriff sold the goods and they were removed, he was liable to an action by the landlord: see, as to the damages recoverable, *Thomas v. Mirehouse* (1887), 19 Q.B.D. 563. So long as the landlord was unpaid, the sheriff could not be compelled to sell the goods; and an action by an execution creditor for not selling could not be sustained against him: *Cocker v. Musgrove* (1846), 9 Q.B. 223. The sheriff might retain possession;

but when it becomes plain that no one would pay the landlord, the sheriff could withdraw and return nulla bona to the writ: see *Thomas v. Mirehouse* (1887), 19 Q.B.D. 563, and *Wintle v. Freeman* (1841), 11 Ad. & El. 539. As soon as he withdrew the landlord could distrain for his whole rent in arrear.

“Such were the strict rights of the parties. But now suppose the sheriff sold and deprived the landlord of what was practically his lien on the goods, and then, to save himself from an action by the landlord, paid him out of the proceeds of the sale or handed the proceeds of the sale in part discharge of the rent due to him. Strictly speaking, this would be irregular unless the landlord consented; but, even if he did not, still on one would be damnified if the sale was fairly conducted. The landlord would have nothing to complain of, for he would get his money, so far, at all events, as the goods seized could be made available for his payment. The execution debtor would not be damnified, for he owed the rent, and he could not get his goods without paying it. The execution creditor would not be damnified, for he could not get paid without satisfying the landlord. Hence it became the practice for the sheriff to sell and to pay the landlord; and it was held that, if the sheriff sold without paying the landlord, the landlord, instead of bringing an action against the sheriff on the statute, might apply to the court for and obtain a rule – that is, an order for payment out of the proceeds of sale: *Henchett v. Kimpson* (1762), 2 Wils. 140, and *Arnitt v. Garnett* (1820), 3 B. & Ald. 440. This mode of procedure became the common practice; and if the sheriff had notice of the landlord’s claim before the proceeds of sale were parted with, the landlord could, if in time, obtain payment out of the proceeds: *Yates v. Ratledge* (1860), 5 H. & N. 249; and if too late, he could sue the sheriff for removing the goods without paying him: *Andrews v. Dixon* (1820), 3 B. & Ald. 645. The right of the landlord to be paid out of the proceeds of the sale thus became recognised and established where no bankruptcy intervened.”

This decision was based on s. 1 of “An Act for the better security of rents and to prevent frauds committed by tenants”, 8 Anne, c. 14.

I have now to consider whether this is an Act which is of general application within the meaning of s. 2 of the Judicature Ordinance, 1962. There is no direct authority on this, but it was held in *Karimjee Jivanjee & Co. v. The Official Receiver of the Government of Tanganyika* (2) (1936), 3 E.A.C.A. 94, that “the Law of Distress Amendment Act, 1888, was a statute of general application in Tanganyika”. That Act was similar to the Distress for Rents (Bailiffs) Ordinance in Uganda. As I see it, as 8 Anne, c. 14, is not a private or a local Act, it is, in my view, a law of general application in Uganda.

That being so, the position of the landlord vis-à-vis the bailiff in the instant case, would appear to be as decided in *Re MacKenzie, Ex parte Sheriff of Hertfordshire* (1), which has not been overruled or dissented from in subsequent cases. As applied to the instant case, I would make the following observations.

It was wrong of the landlord to instruct Naseer to distrain for arrears of rent when the property was in custodia legis and protected from seizure from him.

Secondly, the bailiff ought not to have removed the debtor’s property, but to have requested the judgment-creditor to pay the arrears of rent. If he refused to do so, he should have returned a nulla bona to the warrant and withdrawn. The landlord could then have distrained for rent in arrear up to one year. If he disregarded the strict rights of the parties, as he did in this case, albeit on authority from the deputy registrar, the validity of which I shall deal with hereafter, he became liable to an action by the landlord for the removal of the goods. He could have paid the rent out of the proceeds of the sale and neither the

debtor nor creditor would in any way be damnified as the debtor owed the rent anyway and the creditor could not be paid without satisfying the landlord.

Where, however, as in this case, the bailiff paid the proceeds of the sale into court, the landlord can, instead of bringing an action against the bailiff, move the court for an order for payment out of the proceeds, his claim for rent.

Mr. M. L. Patel argued that his proper course was to get a court order as the bailiff was protected under s. 23 (2) of the Order-in-Council, 1902, which has now been incorporated in s. 6 of the Judicature Ordinance, 1962:

- “6. No judge, magistrate or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, if he at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of any court or other person bonded to execute the lawful orders or warrants of any such judge, magistrate or other person acting judicially shall be liable to be sued in any civil court in respect of any act done in execution of any order or warrant which he would be bound to execute if within the jurisdiction of the person issuing the same.”

The case of *Re MacKenzie, Ex parte Sheriff of Hertfordshire* (1), seems to be an authority that that is not so. In my view, the bailiff is not protected if he carries out his execution in contravention of the law relating to distress.

As a matter of convenience, it has become the practice for a landlord to proceed to obtain a court order rather than proceed against the bailiff. It is clear, therefore, that Mr. Ishani's preliminary point that the landlord has no locus standi has no merit and is dismissed.

*Preliminary objection dismissed.*

For the applicant/landlord:

*ML Patel*

*Manubhai Patel & Son, Kampala*

For the respondent/plaintiff:

*A Ishani*

*Ishani & Ishani, Kampala*

The defendant did not appear and was not represented.

**Francis s/o Ungani v Republic**  
[1963] 1 EA 460 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 7 August 1963                             |
| <b>Case Number:</b>      | 490/1963                                  |
| <b>Before:</b>           | Law J                                     |

*[1] Criminal law – Plea – Theft of government property – Admission that property stolen – Plea of guilty to a scheduled offence entered – No proof that thing stolen was government property – Minimum Sentences Act, 1963 (T.).*

*[2] Criminal law – Sentence – Theft of government property – No proof that thing stolen was government property – Admission that property stolen – Plea of guilty to a scheduled offence entered – Sentence imposed under Minimum Sentences Act, 1963 – Validity of sentence – Penal Code (Cap. 16), s. 265, s. 296 and s. 297 (T.) – Minimum Sentences Act, 1963, s. 5 (1) and (2) (T.).*

### **Editor's Summary**

The appellant, who was charged on 19 counts, pleaded guilty to 12 of these and was convicted. Count 18 alleged breaking into the Ministry of Agriculture and there stealing a table clock. A theft of government property, when the offender knew or ought to have known that the thing stolen was government property,



is a scheduled offence under the Minimum Sentences Act, 1963, which imposes severe sentences for scheduled offences. In his answer to the charge on count 18 the appellant replied “Yes, I admit this, I stole a clock”. The magistrate entered a plea of guilty to this count and held that this constituted a plea of guilty to a scheduled offence under the Act and imposed the minimum sentence of two years’ imprisonment and twenty-four strokes. On appeal against sentence

**Held –**

- (i) in the absence of a clear admission on the part of the appellant or of proof beyond reasonable doubt that at the time of stealing the clock he knew or should have known it to be government property, the stealing did not constitute a scheduled offence under the Minimum Sentences Act, 1963, and accordingly the appellant’s plea should not have been construed as a plea of guilty to a scheduled offence.
- (ii) the sentence imposed on count 18 by the magistrate was invalid and should be set aside and a sentence of six months’ imprisonment concurrent with the sentence on count 17 should be substituted.
- (iii) having regard to the exceptional severity of the Minimum Sentences Act, 1963, its provisions must be strictly construed, and before any person is convicted of a scheduled offence, it must be shown beyond all shadow of doubt that he comes within the scope of the Act.

Sentence reduced to three and a half years’ imprisonment.

**No cases referred to in judgment**

**Judgment**

**Law J:** This is an appeal against sentence only. The appellant pleaded guilty to 7 counts of breaking into buildings with intent to commit a felony, contrary to s. 297 of the Penal Code, and to 5 counts of stealing, contrary to s. 265 of the Penal Code. These 5 counts were connected with 5 of the 7 counts of breaking. In all these cases the appellant broke into offices, in two cases of business firms, in one case of the High Commissioner for India, in one case of the Tanganyika Society for the Prevention of Cruelty to Animals, and in one case of a Government department. In all these 5 cases it would have been possible for the appellant to have been charged with the composite offence of breaking into an office, and committing the felony of stealing therein, contrary to s. 296 of the Penal Code. Section 297 applied in cases where there has been a breaking with intent to commit a felony, but no felony was in fact committed. The point is not merely academic, because housebreaking, burglary and office breaking contrary to s. 294 and s. 296 of the Penal Code are scheduled offences under the Minimum Sentences Act, 1963, but breaking with intent to commit a felony, contrary to s. 297, is not a scheduled offence. It may be that the charges in this case were framed under s. 297, rather than s. 296, intentionally and with the object of mitigating the severity of the Minimum Sentences Act. Whatever the reason, the appellant has been fortunate in the prosecution’s choice of charges. Counts 17 and 18, to which the appellant pleaded guilty, concerned a breaking into the offices of the Ministry of Agriculture, and the stealing of a table clock said to be worth Shs. 50. Theft of Government property is a scheduled offence, when the offender knew or ought to have known that the thing stolen was the property of the Government. In his answer to the charge on count 18 the appellant relied – “Yes, I admit this, I stole a clock”. On this count, the learned magistrate entered a

plea of guilty, and, holding that this constituted a plea of guilty to a scheduled offence, imposed the minimum sentence of two years' imprisonment and twenty-four strokes. With respect, I do not consider that the appellant's plea should have been so construed. He did not admit that he knew, or ought to have known, that the clock was the property of the Government. Table clocks are not normally

provided in Government offices, and the appellant may well have thought that the clock was the private property of the occupant of the office. The appellant's plea on count 18 amounted to no more than a plea of guilty to stealing a clock said to be the property of the Government. In the absence of a clear admission on his part, or of proof beyond reasonable doubt, that at the time of stealing the clock he knew or should have known it to be Government property, the appellant's action in stealing the clock does not constitute a scheduled offence. In my view, where the prosecution claim that a charge of stealing comes within the provisions of the Minimum Sentences Act, the particulars of offence should read:

"A.B. on the . . . day of . . . at . . . stole a clock valued at Shs. 50, the said clock being the property of the Government, and the said A.B. at the time of such stealing knew or ought to have known that the said clock was the property of the Government."

I accordingly set aside the sentence of two years' imprisonment and twenty-four strokes of corporal punishment passed on count 18, and substitute a sentence of six months' imprisonment concurrent with the sentence on count 17. The other sentences imposed by the learned resident magistrate will stand. The result of this is that the appellant will serve a total sentence of three and a half years' imprisonment, instead of five years. The appellant has asked to be repatriated to Masasi on the expiry of his sentence. I support this request and hope it will be put into effect.

This appeal illustrates many of the anomalies and difficulties arising out of the application of the Minimum Sentences Act. Had the appellant been charged with offences contrary to s. 296 of the Penal Code on counts 5, 8, 10, 14 and 17, as he could have been, he would have received five sentences of not less than two years' imprisonment each, some of which might have been ordered to run concurrently, and would have been liable to one hundred and twenty strokes of corporal punishment. I express the opinion that in such a case s. 10 of the Corporal Punishment Ordinance (Cap. 17), would apply and only twenty-four strokes would actually be awarded, unless the court otherwise ordered under s. 5 (1) of the Minimum Sentences Act. It is unfortunate that the Act does not make this clear. The appellant was convicted of stealing in 1961 and sentenced to fifteen days' imprisonment. This must have been a trifling offence, nevertheless, for the purposes of the Minimum Sentences Act, the appellant would not be a first offender, and the court would be deprived of even the limited discretion conferred by s. 5 (2) of that Act in sentencing him. Having regard to the exceptional severity of the Minimum Sentences Act, its provisions must be strictly construed, and before any person is convicted of a scheduled offence, it must be shown beyond all shadow of doubt that he comes within the scope of that Act.

This appeal against sentence succeeds to the limited extent indicated above.

*Sentence reduced to three and a half years' imprisonment.*

The appellant in person.

For the respondent:

*KRK Tampi* (State Attorney, Tanganyika)

*The Director of Public Prosecutions*, Tanganyika

**Kristina d/o Hamisi v Omari Ntalala and another**

## [1963] 1 EA 463 (HCT)

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 8 August 1963  
**Case Number:** 5/1963  
**Before:** Spry J  
**Sourced by:** LawAfrica

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*[1] Divorce – Adultery – Condonation – Christian first marriage of husband – Second marriage of husband under Islamic law – First wife residing with husband after second marriage – First wife thereafter living apart from husband – Whether adultery of husband after first wife’s departure condoned by her – Matrimonial Causes Ordinance (Cap. 364), s. 10 (2) (T.).*

### Editor’s Summary

The appellant petitioned for divorce from the respondent on the ground of his adultery with his second wife whom he had married under Islamic law. The appellant had been married to the respondent by a Christian ceremony and had also resided with the respondent for some time after his second marriage, but had for about a year been living apart from him. The magistrate held that the adultery had been condoned and accordingly dismissed the petition under s. 10 (2) of the Matrimonial Causes Ordinance and also dismissed an application by appellant for custody of her two children. On appeal

### Held –

- (i) since the second ceremony of marriage was invalid, the relationship between the respondent and his second wife was an adulterous one; the appellant’s condonation related only to the adultery which had taken place prior to her departure and not to the adultery committed after her departure.
- (ii) the custody of the two children should be awarded to the appellant.

Order for the issue of decree nisi. Custody of the children granted to the appellant.

### No cases referred to in judgment

### Judgment

**Spry J:** The appellant, Kristina d/o Hamisi, petitioned for divorce from her husband, Omari Ntalala, in the district court of Kigoma. She asserted that she had been married to the respondent by a Christian ceremony. Subsequently, he went through a ceremony of marriage under Islamic law with another woman, the co-respondent, with whom he lived. The appellant claimed to be entitled to a divorce on the ground of adultery.

At the hearing of the petition, the respondent did not dispute any of the facts alleged by the appellant but merely asserted that the petitioner had raised no objection to the second marriage. The appellant, for her part, admitted that she had continued to live with the respondent as his wife for some time after the

second marriage, but said that she had then been living apart from him, with her own relations, for about a year.

On these facts, the magistrate held that the adultery had been condoned and accordingly dismissed the petition under s. 10 (2) of the Matrimonial Causes Ordinance (Cap. 364). With respect, I think he was wrong. The adultery continued after the appellant had left the respondent and her condonation clearly related only to the adultery which had taken place prior to her departure. There was nothing to suggest that any subsequent acts of adultery had been condoned.

The magistrate appears to have accepted that the relationship of the respondent with the woman with whom he went through the second ceremony of marriage constituted adultery, although he made no express finding. I think that was undoubtedly so. The respondent, having contracted a Christian marriage,

was incapable, while that marriage subsisted, of marrying any other person. That position was not and could not be altered by any change of religion by the respondent alone. It might have been different had both the appellant and the respondent changed their religions but I express no opinion on that, as it is not necessary for the purposes of this appeal. Since the second ceremony of marriage was invalid, the relationship between the respondent and the co-respondent was an adulterous one.

I accordingly set aside the order of the magistrate dismissing the petition and substitute an order for the issue of a decree nisi. When this has been done, it will be for the appellant to apply in the usual way for the making of a decree absolute.

In this connection, it appears that at a date subsequent to the dismissal of her petition, the appellant returned to her husband. I am satisfied that she did so because she believed that she had been ordered to do so by the magistrate and had no alternative. Her returning does not therefore amount to condonation of the respondent's adultery.

When dismissing the petition, the magistrate also dismissed an application by the appellant for custody of her two children. In the absence of special circumstances, it is generally in the interests of very young children to be in the custody of their mother. I therefore set aside the order of the magistrate and award the custody of the two children to their mother, the appellant. The respondent will be at liberty to move the court if the circumstances change in such a way that the welfare of the children calls for reconsideration of this order. This order is limited to the custody of the children; it does not affect any rights that may exist or may arise in the future to any payments under customary law.

*Order for the issue of decree nisi. Custody of the children granted to the appellant.*

### **ST Paryani v RB Choitram and others** [1963] 1 EA 464 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 1 August 1963                             |
| <b>Case Number:</b>      | 20/1962                                   |
| <b>Before:</b>           | Sir Ralph Windham CJ                      |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Practice – Application by judgment-debtor for adjustment of decree – Application refused – Whether appeal lies – Indian Civil Procedure Rules, O. XXI, r. 2 (2) – Indian Civil Procedure Code, 1908, s. 2, s. 96 and s. 104.*

[2] *Appeal – Further evidence – Appeal from ruling made after evidence of parties heard – Application to admit fresh evidence – Evidence to destroy respondent's credibility – Ruling not reliant upon respondent's evidence – Whether court will admit such evidence – Indian Civil Procedure Rules, O. XLI, r. 27 – Indian Civil Procedure Code, 1908, s. 151.*

**Editor's Summary**

The applicant, a judgment-debtor, applied to a magistrate for a declaration that certain payments made by him to the respondent were made in satisfaction of the judgment debt. After hearing evidence which included that of the applicant, the respondent and a witness, P., called for the respondent, the magistrate dismissed the application, and in his ruling relied substantially on the evidence of the witness, P. and the weakness of the evidence and case of the applicant. The applicant having filed an appeal against the magistrate's ruling, applied

under O. XLI, r. 27, of the Indian Civil Procedure Rules or alternatively under s. 151 of the Indian Civil Procedure Code, 1908, to adduce additional evidence to discredit the credibility of the respondent as a witness before the magistrate. For the respondent a preliminary objection was taken that the ruling against which the appeal had been filed was not appealable because it was neither a decree as defined by s. 2 of the Indian Civil Procedure Code nor an order appealable under s. 104.

**Held –**

- (i) the application and its dismissal by the magistrate fell within O. XXI of the Indian Civil Procedure Rules, and the decision upon such an application is appealable;

*Jadunandan Singh v. Sheonandan Singh* (1922), 1 Pat. 644, applied.

- (ii) since the magistrate had not relied upon the respondent's evidence in his ruling it could not be said that, even if the new evidence sought to be adduced had been before him, the magistrate would have or reasonably might have arrived at a different decision, and accordingly the applicant was not entitled to adduce further evidence;
- (iii) the applicant had failed to satisfy the requirements laid down in the cases on the circumstances in which fresh evidence will be received and since the court could not hold that under O. XLI, r. 27, the fresh evidence would be required or that the end of justice demanded the reception of the evidence under s. 151 of the Indian Civil Procedure Code, the application must be dismissed.

Application dismissed.

**Cases referred to in judgment:**

- (1) *Jadunandan Singh v. Sheonandan Singh* (1922), 1 Pat. 644.
- (2) *Meek v. Fleming*, [1961] 3 All E.R. 148.
- (3) *Tarmohamed and Another v. Lakhani & Co.*, [1958] E.A. 567 (C.A.).
- (4) *Ladd v. Marshall*, [1954] 3 All E.R. 745.

**Judgment**

**Sir Ralph Windham CJ:** The applicant is the appellant in a pending civil appeal, and he applies under O. XLI, r. 27, of the Indian Civil Procedure Rules, or alternatively invokes the inherent power of the court preserved by s. 151 of the Indian Civil Procedure Code, 1908, to be allowed to adduce additional evidence for the purpose of the appeal.

A preliminary objection has been raised by the respondent, on the ground that the ruling and decree dated May 19, 1962, against which the appeal has been filed, are in any case not appealable at all, because (it is contended) neither do they constitute a "decree" as defined in s. 2 of the Civil Procedure Code, so as to make them appealable under s. 96 of the Code, nor are they an "order" appealable under s. 104. This contention cannot prevail. What the applicant seeks to appeal against is the dismissal of an application made by himself as judgment-debtor, that the court below should declare that certain payments made by him had been made in satisfaction of that judgment-debt. In short, his application, and the court's dismissal of it, fell within O. XXI, r. 2 (2) of the Civil Procedure Rules, the court being asked



by him to record as certified the payment or adjustment of the judgment-debt. And it has been specifically held by the Indian courts, on a number of occasions, perhaps most explicitly in *Jadunandan Singh v. Sheonandan Singh* (1) (1922), 1 Pat. 644, at p. 647, that a decision upon such an application is appealable. Relying on those decisions, Mulla, in his Code of Civil Procedure (10th Edn.), at p. 702, puts the position thus:

“An order allowing or refusing an application to record an adjustment of a decree or a payment made out of court under a decree is a decree within the meaning of s. 2, cl. 3, read with s. 47, and is therefore appealable under s. 96.”

There is accordingly no substance in the preliminary objection, and I turn to the application on its merits.

The decision of the learned magistrate against which the applicant is appealing, namely the dismissal of his application for a declaration that certain payments made by him to the plaintiff/respondent were attributable to the judgment-debt, was arrived at after the adducing of evidence by each side, oral and documentary, and was embodied in a written ruling in which the evidence was considered. Among those who testified was the plaintiff-respondent. What the applicant now seeks by way of additional evidence, according to his affidavit in support of this application, is to be allowed further to cross-examine the plaintiff in order to shake his credit by putting to him two matters which were not put to him at the hearing. The first of these is that Barclays Bank, Nairobi, had sued the plaintiff for a large amount, notice of the suit being published in the “East African Standard” of October 21, 1960. The object of bringing this matter to light would be to contradict the plaintiff’s statement in evidence (given on January 14, 1962) that

“we had no financial trouble with Barclay’s, Nairobi; we still have an account with them in Nairobi”,

and, thereby to shake his credit. The second matter, sought to be raised with the same object, is the alleged conviction of the plaintiff, on June 9, 1952, on a charge of giving false information to a police officer. Presumably, although his supporting affidavit does not expressly so pray, the applicant wishes to be allowed to adduce evidence in proof of these two matters as facts, in the event of the plaintiff refusing, under further cross-examination, to admit them. The applicant, in his supporting affidavit, states that at the time of the hearing he was unaware of either of these two matters, and has only since come to know of them.

Now if it appeared from the nature of the plaintiff’s evidence itself, and from a perusal of the learned magistrate’s ruling, that the latter’s decision upon the application before him was in any substantial degree based upon the plaintiff’s own evidence and dependent on his credibility, then it might perhaps be arguable that the adducing in evidence of these two further facts to discredit the plaintiff’s veracity would, or at least that there is a reasonable chance that it would, have so tipped the scale that the learned magistrate would have reached the opposite decision from that which he did reach. And with regard to the plaintiff having been sued by Barclays Bank, though hardly with regard to his alleged previous conviction, it might be successfully argued, applying the principles recently laid down in *Meek v. Fleming* (2), [1961] 3 All E.R. 148, that the plaintiff had deliberately misled the court in a material matter by omitting to mention that he had been sued by the Bank, and that the position must be put right by allowing evidence of that fact to be now adduced, as a basis for argument in the pending appeal that the balance of probabilities had now become other than what it appeared to the learned magistrate to be, and that this was a ground on which the latter’s decision should be reversed.

But such is not the position here. An examination of the magistrate’s ruling, which runs to several pages, shows that his decision was not based primarily or even substantially on the plaintiff’s own evidence. It was expressly based on the weakness of the defendant-applicant’s own case and his failure to prove on a balance of probabilities what it lay upon him to prove, namely that the payments

made by him were made in discharge of the judgment-debt. And in so far as the strength of the plaintiff's case in opposing that application was also a factor influencing the decision, the person who impressed the court as a "transparently honest witness" who "remained unshaken and confident" was not (so far as appears from the ruling) the plaintiff himself but a witness whom the plaintiff called, namely one Pandya. Not once in the whole of his ruling did the learned magistrate make any remark or finding with regard to the credibility of the plaintiff himself. That being so, I am quite unable to hold that, if the evidence now sought to be adduced or admitted had been before the magistrate, he would have, or even reasonably might have, arrived at a different decision. For such evidence would have left untouched both the credit of Pandya and the weakness of the applicant's own case. This takes the present case quite outside the ambit of *Meek v. Fleming* (2), where the credibility of the defendant was the vital factor in the whole case and where the concealing of a certain fact by him had a vital bearing on his credibility. Rather, this is a case where the principles should be applied which have been laid down in earlier English decisions and which were clearly enunciated by the Court of Appeal for Eastern Africa in *Tarmohamed and Another v. Lakhani & Co.* (3), [1958] E.A. 567 (C.A.), at pp. 574 – 5. One of those English decisions was *Ladd v. Marshall* (4), [1954] 3 All E.R. 745, where at p. 748, Denning, L.J., as he then was, said:

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive . . ."

In the present case, neither of these two conditions has been fulfilled.

Lastly, the present application is brought primarily under O. XLI, r. 27, of the Indian Civil Procedure Rules. Under that rule additional evidence may be produced by a party to an appeal if, *inter alia*, the Appellate Court requires it "to enable it to pronounce judgment" or "for any other substantial cause". I am quite unable to hold that this court requires the evidence now sought to be adduced for any such purpose. Nor is this a case where, the applicant having failed to satisfy the requirements laid down regarding fresh evidence either in the decided cases or in O. XLI, r. 27, he can invoke the inherent power of the court, preserved by s. 151 of the Civil Procedure Code, to make orders that are "necessary for the ends of justice". In any event, I do not consider that the ends of justice demand the making of the order now sought.

This application must accordingly be dismissed with costs.

*Application dismissed.*

For the applicant:

*KA Master QC*

*KA Master & Co, Dar-es-Salaam*

For the respondent:

*KL Jhaveri*

*George N Houry & Co, Dar-es-Salaam*

**African Overseas Trading Co v Tansukh S Acharya**

## [1963] 1 EA 468 (HCT)

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 8 August 1963  
**Case Number:** 7/1963  
**Before:** Weston J  
**Sourced by:** LawAfrica

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*[1] Pleading – Complaint – Action for goods sold and delivered – No averment in body of complaint of date when goods sold and delivered – Account annexed to complaint – Account setting out dates of sales and payments on account – Complaint rejected as disclosing no cause of action – Whether annexure forms part of a complaint – Indian Civil Procedure Rules, O. VI, r. 17 and O. VII, r. 11 (a).*

*[2] Practice – Pleading – Complaint – Amendment – Limitation – Amendment to plead exemption from limitation – Indian Civil Procedure Rules, O. VI, r. 17.*

### Editor's Summary

The appellant sued the defendant for Shs. 1,399/50, due for the agreed or, alternatively, the reasonable price of goods sold and delivered as shown by a statement of account annexed to the complaint. Subsequently the appellant applied for amendment of the complaint so as to include (a) interest and telegram charges, (b) to plead amended dates of two invoices and (c) to plead exemption from limitation on the ground of an alleged acknowledgment of the debt. The magistrate not only dismissed this application but taking the view that the statement of account did not form part of the complaint rejected the complaint also under O. VII, r. 11 (a), of the Indian Civil Procedure Rules, on the ground that the complaint disclosed no cause of action. On appeal

### Held –

- (i) the complaint should have been read together with the statement of account which formed part of the complaint and so read it disclosed a cause of action.
- (ii) the appellant was entitled to amend the complaint so as to plead exemption from limitation on the ground of an alleged acknowledgment of the debt in the form of a letter but he was not entitled to amend the complaint so as to include the claims for interest and telegram charges.

Appeal allowed in part. Case remitted to the court below for hearing.

### Cases referred to in judgment:

- (1) *Jeraj Shariff & Co. v. Chotai Fancy Stores*, [1960] E.A. 374 (C.A.).
- (2) *Bertram Ltd. v. Regent Estates Ltd.*, E.A.C.A. Civil Appeal No. 62 of 1962 (unreported).
- (3) *Weldon v. Neal* (1880), 19 Q.B.D. 394.
- (4) *Gunnaji v. Mekanji* (1900), 34 Bom. 250.

## **Judgment**

**Weston J:** The appellants, as plaintiffs in the district court of Dar-es-Salaam District at Dar-es-Salaam – I shall so refer to them hereinafter – claimed from the respondent, the defendant in the court below – and I shall so refer to him in this judgment – the sum of Shs. 1,399/50 alleged, in the plaint which was dated November 4, 1961, and presented three days later, to be

“the amount due for the agreed or in the alternative reasonable price of goods sold and delivered as per statement of account annexed hereto and marked ‘A’, to which the plaintiffs crave leave to refer”.

The summons was served on the defendant on November 22, 1961, and on December 5, 1961, notification of intention to defend was duly filed. On December 12, 1961, the defendant’s advocate, by letter of that date addressed to the plaintiffs’ advocate, requested more legible copies of the two invoices – there are two only – referred to on the last page of the annexure to the plaint, which information he stated he required to enable him to file the defence. These entries read as follows:

“1.6.59 to Goods I. No. 802 Shs. 182/58

26.7.59 to Goods I. No. 1092 Shs. 6/90.”

To this letter there was apparently no reply, but on February 26, 1962, the plaintiffs applied to the court under O. VI, r. 17, of the Indian Civil Procedure Rules, for leave to amend their pleading in two respects, as under:

- “1. The plaint to be amended so as to include the interest and telegram charges as stated in the annexure to the plaint, and that the last two invoices be read as dated in the year 1958.
- “2. The plaint be also amended so as to include the ground of exemption from limitation, which is an acknowledgment in the form of a letter dated June 9, 1959, which is within time.”

The application was supported by the affidavit of a partner in the plaintiffs’ firm to the effect that the errors in the particulars of the two invoices in question, as well as the omission to plead the alleged acknowledgment of the debt, were “due to oversight”.

The learned magistrate eventually, by a ruling dated February 19, 1963, rejected the application, and further, rejected the plaint itself under O. VII, r. 11 (a), of the Indian Civil Procedure Rules, with costs to the defendant. This is an appeal against the decree taken out on that ruling, the material part of which reads as follows:

“... I am in [no] doubt whatsoever that the original plaint should have been rejected under O. VII, r. 11 (a), since nowhere in the body of the plaint is there an express or implied averment which satisfies the requirements of O. VII, r. 1 (e), namely that the plaint itself should set out the facts constituting the cause of action and when it arose.

“Now it is abundantly clear and well established that the date when an alleged cause of action arises is a material fact always to be pleaded and one of that bundle of facts constituting, within the meaning ascribed thereto by s. 20, Civil Procedure Code, the cause of action. Without it therefore the cause of action is incomplete and non-existent.

“In which case it follows that under O. VII, r. 11 (a) of the Civil Procedure Rules, which rule is mandatory, I have no alternative but to reject the plaint. Mr. Patel has not, however, specifically argued this point but the fact that he did not take it is immaterial, for it is clear from the commentaries by the learned authors of the various editions of the Civil Procedure Code, including Mulla (10th Edn.), at p. 564 et seq., that it is a court’s duty to examine a plaint and the power to reject under O. VII, r. 11, is exercisable at any stage of the proceedings, even after the suit has been numbered and registered.

“This in my opinion is sufficient to dispose of this present application . . .”

Thus it is plain that the learned magistrate did not in fact find it necessary to deal on its merits with the application that was actually before him. He held that the plaint which it was sought to amend disclosed no cause of action, and under O. VII, r. 11 (a) he had no alternative but to reject it. There was in his view, “the obvious impossibility of amending something which does not exist”..

It is clear from the passage I have quoted, and in particular from the reference to “the body of the plaint”, that the learned magistrate was of the opinion that the annexure to the plaint did not form part of it and was not to be read together with it. In “the body of the plaint” there was no averment of the date when the goods were sold and delivered, and without it “the cause of action is incomplete and non-existent”.

Certainly, there is no statement in “the body of the plaint” in which the date when the cause of action arose is expressed or from which it can be implied, but in my view the learned magistrate, in holding that “the body of the plaint” only was to be looked at, was taking too narrow a view. Whatever may be the practice in the courts of those countries from which our rules of procedure have come, it is now too late to question the acceptance by the courts of this country of the mode of pleading used by the plaintiffs here. The reports abound with instances in which it has been accepted without comment. Nay, there is the highest authority for the proposition that a plaint can properly be read together with the annexures thereto. Thus, in *Jeraj Shariff & Co. v. Chotai Fancy Stores* (1), [1960] E.A. 374 (C.A.), Windham, J.A. (as he then was), at p. 375, said this:

“The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.”

In a more recent case, *Bertram Ltd. v. Regent Estates Ltd.* (2), E.A.C.A. Civil Appeal No. 62 of 1962 (unreported), but referred to in the Digest of Decisions of the Court of Appeal for Eastern Africa for February, 1963), Sinclair, P., said this:

“It is averred in para. 3 of the amended plaint that:

‘The defendant company is indebted to the plaintiff company in the sum of Shs. 39,658/61, being balance of current account as per statement of account annexed hereto and marked “A” for cash advanced to each other by way of loan and interest.’

The statement of account annexed to the plaint shows a balance due by the defendant company to the plaintiff company of a sum of Shs. 39, 658/61. That is in my opinion a sufficient averment that that sum is due and owing by the defendant company to the plaintiff company for money lent.”

In my judgment then, the plaint in this case was to be read together with the statement of account annexed to it, and so read it did disclose a cause of action. That cause of action was for the balance of the price of goods sold and delivered, and the dates on which those goods were sold and delivered, as well as dates on which payments on account were made, are pleaded with sufficient particularity for the purpose of determining whether or not a cause of action was disclosed. Furthermore, when presented to the court below on November 7, 1961, the suit was not *prima facie* time barred, for the last entry in the account is the item “26.7.59 To Goods I. No. 1092 Shs. 6/90”, and it is not in dispute that the relevant period of limitation is three years.

So much for the plaint. I turn now to the merits of the application for its amendment. The first prayer is for an amendment which seeks (a) to alter the

dates of the two invoices in question from “1.6.59” and “26.7.59” to “1.6.58” and “26.7.58” respectively, and (b) to alter the particulars of the accounts rendered from “to goods” to “to interest” and to “to telegram charges” respectively.

The learned magistrate commented on this amendment as follows:

“I think I need only say that such an amendment appears to me to be an attempt to introduce an entirely new cause of action separate and distinct from the original type averred in the plaint. It is not entirely clear whether such an amendment would have the effect of completely displacing or substantially changing the character of the original action but in view of the lateness of this application and in all the circumstances I would feel bound to exercise my discretion under O. VI, r. 17, to reject such a proposed amendment.”

With respect, I entirely agree. The action was for the balance of the price of goods sold and delivered, and the addition of further claims for “interest” and “telegram charges”, which could only have been the subject-matter of an agreement or agreements outside the contract for the sale of goods alleged, would “change one action into another of a substantially different character”. It is well settled that leave to amend in such cases is not granted.

As to the second amendment prayed for, namely leave to plead an alleged acknowledgment in the form of a letter dated June 9, 1959, this was presumably applied for because if the first amendment had been allowed the alteration of the dates of the invoices from 1959 to 1958 would have resulted in the plaint showing a claim that was *prima facie* time barred, for the three-year period from 26.7.58 would expire on 26.7.61 and the plaint, as I have said, was presented on November 7, 1961. The first amendment, as I have already said, cannot be allowed; but the effect of that is that what remains of the claim is still *prima facie* time barred. The plaint, read now without the last two entries – the plaintiff is clearly estopped from claiming in respect of them – shows as the last item in the statement of account annexed to it a cash payment of Shs. 600/-, by the defendant to the plaintiffs on 25.10.57. The question is, whether the plaintiffs should be allowed to plead the alleged acknowledgment of June 9, 1959, of their claim, which now amounts to Shs. 1,210/02 only.

I am in no doubt that the answer is yes.

Mr. Patel, for the defendant, argues strongly that to allow such an amendment would offend against the principle in *Weldon v. Neal* (3) (1880), 19 Q.B.D. 394. Such an amendment, he submits, would take away from the defendant a legal right which has accrued to him by lapse of time. With respect, the simple answer to this argument is that no legal right has accrued to the defendant by lapse of time. The plaintiffs are not seeking here, as in *Weldon v. Neal* (3), to amend by setting up any fresh claim in respect of any cause of action which, since their suit was presented, has become time barred. They are seeking to correct an error in the presentation of the claim originally made, or what is left of it. If the plaintiffs were seeking to plead an alleged acknowledgment dated later than November 7, 1961, then indeed the defendant would have a valid argument based on the principle in *Weldon v. Neal* (3), but this is not so. The acknowledgment of their claim is alleged to have been in existence long before that claim was presented to the court, and it seems to me that if, “due to oversight”, they did not plead it, there is no reason at all why they should not be allowed to do so, subject always to meeting any costs incurred as a result of their negligence. In *Gunnaji v. Makanji* (4) (1900), 34 Bom. 250 – and I quote from the headnote:

“At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account, the defendant raised a plea of limitation. The



plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower court refused the application.”

On appeal it was held that the amendment should have been allowed.

In the result then, this appeal must succeed in part. I direct that the case be returned to the court below to try and determine on the footing of a plaint amended in the following respects:

- (a) The last two items of the statement of account attached to the plaint will be struck out.
- (b) For the amount of Shs. 1,399/50, claimed there will be substituted the sum of Shs. 1,210/02.
- (c) The plaintiffs will be allowed to add the ground of exemption from limitation in the form of the letter dated June 9, 1959.

There remains only the question of costs, and in this matter also I propose to follow *Gunnaji v. Makanji* (4), Scott, C.J., there said at p. 252:

“ . . as the controversy has arisen entirely through the negligence of the plaintiffs we direct that they must pay the costs of the appeal and of the first hearing in the court below . . . ”

So here the plaintiffs will pay the costs of this appeal as well as the costs of the hearing in the District Court, which, I see, were agreed at Shs. 30/-.

*Appeal allowed in part. Case remitted to the court below for hearing.*

For the appellant:

*KC Desai*

*KC Desai, Dar-es-Salaam*

For the respondent:

*BN Patel*

*Baloo Patel & Co, Dar-es-Salaam*

## **Joseph Kazaairne v the Lukiko** [1963] 1 EA 472 (HCU)

|                          |                                  |
|--------------------------|----------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala  |
| <b>Date of judgment:</b> | 10 July 1963                     |
| <b>Case Number:</b>      | 25/1963                          |
| <b>Before:</b>           | Udo Udoma CJ, Jones and Slade JJ |
| <b>Sourced by:</b>       | LawAfrica                        |

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[1] *Constitutional law – Uganda – Independence – Buganda – Constitution of Uganda – Effect on taxing laws of Buganda – Uganda (Independence) Order-in-Council, 1962, s. 4 and s. 26 (U.) – Buganda Graduated Tax Law, 1954 – The Constitution of Uganda, s. 74 and s. 95 and item 6 of Part I of Schedule*

7 (U.) – *Constitution of Buganda*, art. 41 (U.) – *Buganda Native Laws (Declaratory) Ordinance* (Cap. 71) (U.) – *Uganda Agreement*, 1900 (U.) – *Buganda Agreement (Native Laws)*, 1910 (U.) – *Buganda (Declaratory) Agreement (Native Laws)*, 1937 (U.) – *Buganda Agreement*, 1955, *Order-in-Council*, 1955, *First and Second Schedules* (U.) – *Uganda (Constitution) Order-in-Council*, 1962, s. 4.

### **Editor's Summary**

The appellant appealed to the judicial adviser from his conviction by the Principal Court of Buganda of a breach of the Buganda Graduated Tax Law, 1954, of inciting the inhabitants of the counties of Buyaga and Bugangazzi to refuse to pay taxes to the Kabaka's Government and of preventing the chiefs from carrying out their official duties. To enable him to determine the issues

raised by the appellant the judicial adviser sought the opinion of the High Court under s. 95 of the Constitution of Uganda upon the following questions, (a) what effect has s. 26 (3) of the Uganda (Independence) Order-in-Council, 1962, on art. 41 of the Constitution of Buganda in so far as collection of taxes are concerned, (b) is the Tax Law, 1954, a law to which s. 4 (1) of the Independence Order-in-Council applies, (c) if so, what effect, if any, has s. 74 (1) of the Constitution upon the Tax Law, 1954, (d) what effect has s. 74 (1) of the Constitution in relation to the Buganda Graduated Tax Law, 1962? By s. 26 (3) of the Independence Order-in-Council, if the Governor-General acting on the advice of the Prime Minister should so direct, certain provisions of the Independence Order-in-Council and of the Constitution relating to the administration of services, laws for local administration and conferment of functions for the purpose of local administration, were not to apply to the counties of Buyaga and Bugangazzi, but it was common ground that the Governor-General had made no order to that effect. By art. 41 of the Constitution of Buganda Saza chiefs were made responsible to the Katikkiro for administering their sazas and for the collection of taxes, and in their duties they were to be assisted by Gombolola and Mulaka chiefs. It was argued for the appellant that under s. 26 (3) of the Independence Order-in-Council administrative control and authority were vested in the Central Government and its officers and that the chiefs of the Kabaka's Government acted solely for and on behalf of the Central Government in *inter alia* the collection of taxes. It was further argued for the appellant that if the Tax Law, 1954, remained in force after October 18, 1955, i.e. when the First and Second Schedules of the Buganda Agreement, 1955, were declared to have the force of law, then because the Tax Law, 1954, had not been the subject of agreement between the Kabaka's Government and the Uganda Government, its validity ceased after October 9, 1962.

**Held –**

- (i) s. 26 (3) of the Uganda (Independence) Order-in-Council, 1962, had at all relevant times, no effect on art. 41 of the Constitution of Buganda so far as those provisions relate to the collection of taxes.
- (ii) the Tax Law, 1954, was an existing law to which s. 4 (1) of the Uganda (Independence) Order-in-Council, 1963, applied, and s. 74 (1) of the Constitution of Uganda had no effect upon it.
- (iii) the effect of s. 74 (1) of the Constitution of Uganda upon the Tax Law, 1962, was that, by the terms of item 6 of Part I of Sch. 7 to the Constitution, the agreement of the Kabaka's Government and of the Uganda Government was a necessary prerequisite to the making of that law.

Direction to the judicial adviser to dispose of the appeal accordingly.

**No cases referred to in judgment**

**Judgment**

**Udo Udoma CJ:** read the following judgment of the court:

This is a reference made by the judicial adviser, sitting in his appellate capacity, under s. 95 of the Constitution of Uganda for the decision of this court on substantial questions of law relating to the interpretation of the Constitution.

It appears from the terms of the reference made by the judicial adviser that the appellant above named was convicted by the Buganda Principal Court of a breach of the Buganda Graduated Tax Law, 1954

(hereinafter referred to as the “1954 Law”), of inciting the inhabitants of the counties of Buyaga and Bugangazzi to refuse to pay taxes to the Kabaka’s Government, and of preventing the chiefs from carrying out their official duties, the two latter offences being said to be contrary to customary law.

In order to enable him to determine the issues raised in the appeal to his court, the judicial adviser has referred to us, at the instance of one of the parties to the appeal, certain questions for our interpretation which, after hearing argument, we think may be paraphrased in the following terms:

1. What is the effect of s. 26 (3) of the Uganda (Independence) Order-in-Council, 1962 (hereinafter referred to as the "Independence Order") on the provisions of art. 41 of the Constitution of Buganda in so far as those provisions relate to the collection of taxes?
2. Is the 1954 Law a law to which s. 4 (1) of the Independence Order applies?
3. If so, what is the effect, if any, of the provisions of s. 74 (1) of the Constitution upon the 1954 Law?
4. What is the effect of s. 74 (1) of the Constitution in relation to the Buganda Graduated Tax Law, 1962 (hereinafter referred to as the "1962 Law")?

Turning to the first question, s. 26 of the Independence Order contains special provisions in relation to the counties of Buyaga and Bugangazzi (hereinafter referred to as the "two counties") which lie within the present boundaries of the Kingdom of Buganda.

Section 26 (3) of the Independence Order is in the following terms:

- "(3) During the transitional period the local government and other authorities established for the local administration of the county of Buyaga or of the county of Bugangazzi shall be subject only to the direction and control of the Government of Uganda or the officers or authorities of that Government acting under the direction of that Government, and the provisions of ss. 14 (1) and 25 of this Order and of ss. 74 (5) (b) (iv), 78 (3) and 79 of the Constitution of Uganda (so far as those provisions relate to the administration of a service in those counties, any law for the local administration of those counties or the conferment of any functions for the purpose of the local administration of those counties) shall not apply if the Governor-General, acting in accordance with the advice of the Prime Minister, by order so directs."

It is common ground that s. 26 (3) of the Independence Order has at all material times, for the purposes of the appeal, been in operation, nor is there any dispute that the Governor-General has made no order for the purpose of the latter part of the sub-section.

Article 41 of the Constitution of Buganda is in the following terms:

"Chiefs In Buganda

- "41. (1) At the head of each Saza in Buganda there shall be a chief who shall be called a Saza Chief and who shall be responsible to the Katikkiro for the administration of his Saza and for the collection of the taxes he is required to collect by the Katikkiro.
- "(2) Each Saza shall be divided into Gombololas and each such Gombolola shall be in charge of a chief who shall be called a Gombolola Chief. Each Gombolola shall be divided into Miruka and in each Muluka there shall be a chief who shall be styled as Muluka Chief.
- "(3) Gombolola and Muluka Chiefs shall assist Saza Chiefs in the performance of their duties."

So far as the collection of taxes is concerned, it is clear that both the 1954 Law and the 1962 Law impose and confer upon chiefs certain powers and duties.

It is argued for the appellant that by virtue of the provisions of s. 26 (3) of the Independence Order, administrative control and authority are vested in the Central Government and its officers, and that the chiefs of the Kabaka's Government, in the performance of their duties, act solely for and on behalf of the Central Government, those duties including the assessment and collection of taxes for the Central Government.

Now, it is clear from the latter part of s. 26 (3) of the Independence Order that if the Governor-General, acting in accordance with the advice of the Prime Minister, so directs, certain provisions of the Order and of the Constitution, namely those relating to the administration of services in the two counties, laws for their local administration and the conferment of functions for the purpose of their local administration, shall not apply in the two counties. Unless such a direction is made, it follows, in our opinion, that laws applicable throughout Buganda remain applicable to the two counties. There is certainly no power conferred by the earlier part of the sub-section in question to suspend or render inapplicable in the two counties, any law, whether relating to the imposition or collection of taxation or otherwise. It is implicit in the 1954 Law and the 1962 Law that the taxation levied forms part of the revenues of the Kabaka's Government, and the assessment and collection of tax is expressly a matter for officials of the Kabaka's Government. Nothing in s. 26 (3) of the Independence Order, in our opinion, in any way affects the operation of either law.

We next turn to consider the second question which we have framed, which, shortly stated, is whether the 1954 Law is an "existing law" for the purposes of s. 4 of the Independence Order. The expression "existing law" is defined by sub-s. (5) of s. 4, as meaning all ordinances, laws, rules, regulations, resolutions, orders or other instruments having the effect of law made or having effect as if they had been made in pursuance of certain orders-in-council revoked by the Independence Order. We are indebted to the learned Solicitor-General, who appeared in this matter by our invitation as *amicus curiae*, for his admirably clear exposition of the legal position relating to legislation affected by the provisions of s. 4 of the Independence Order.

By the provisions of the Buganda Native Laws (Declaratory) Ordinance (Cap. 71) (hereinafter referred to as "the Ordinance") which was enacted in 1938 for the express purpose of removing doubts as to certain powers of the Kabaka under the Uganda Agreement, 1900, the right of the Kabaka to make laws binding upon all "natives" (as therein defined) was confirmed for so long as the Uganda Agreement, 1900, the Buganda Agreement (Native Laws), 1910, and the Buganda (Declaratory) Agreement (Native Laws), 1937, remained in force. The clear intention of the Ordinance was thus to give the force of law to arrangements agreed between the then Protecting Power and the Kabaka, which arrangements did not of themselves have that force.

The arrangements in respect of the Kabaka's rights of legislation thus agreed and confirmed continued in effect until October 18, 1955, when, by virtue of a proclamation made under the provisions of the Buganda Agreement, 1955, Order-in-Council, 1955, the First and Second Schedules of the Buganda Agreement, 1955, were declared to have the force of law. The First Schedule to which reference has been made sets out a Constitution for Buganda which invests the Kabaka, with the advice and consent of the Lukiko, with powers to make laws binding on Africans in Buganda.

The provisions of the Ordinance can therefore be regarded as spent on October 18, 1955.

That, however, does not, in our opinion, mean that measures passed in exercise of a right declared by the Ordinance immediately ceased to have

legislative effect; such laws are not, in our view, to be regarded as subsidiary legislation which ceases to have effect, unless otherwise saved, upon the repeal of the statutory enactment authorising the making of such subsidiary legislation.

In short, we are of the opinion that the 1954 Law continued, after October 18, 1955, to have effect as part of the law of Buganda, notwithstanding that the provisions of the Ordinance became spent on that date.

The 1954 Law, having been made pursuant to the Ordinance which, in turn, was made in pursuance of the Uganda Order-in-Council, 1920, is to be considered, in our view, as having effect as if it had been made under the 1920 Order. Although that Order was revoked by the Uganda (Constitution) Order-in-Council, 1962, laws having effect as if they had been made in pursuance of the 1920 Order were expressed by s. 4 (5) of the Uganda (Constitution) Order-in-Council, 1962, to have effect as if they had been made in pursuance of that latter Order.

The Uganda (Constitution) Order was revoked by the Independence Order, but, as we have earlier said, any law having effect as if it had been made pursuant to certain revoked Orders (of which the Uganda (Constitution) Order is one) continued to have effect after October 9, 1962, notwithstanding such revocation, provided that such law had effect as part of the law of Uganda or any part thereof immediately prior to October 9, 1962.

We have already expressed the view that, for the reasons we have stated, the 1954 Law had effect as part of the law of Buganda after October 18, 1955. Furthermore, we consider that the 1954 Law not having been repealed prior to October 9, 1962, it must necessarily follow that it was an existing law for the purposes of the Independence Order and so continued to be valid until its subsequent repeal.

We turn to consider the effect of s. 74 (1) of the Constitution upon the 1954 Law. Section 74 (1) of the Constitution empowers the Legislature of the Kingdom of Buganda to make laws, to the exclusion of Parliament, for the peace, order and good government of the Kingdom of Buganda with respect to the matters set out in Part I of Sch. 7 to the Constitution, the relevant item in Part I of that Schedule for the purposes of this reference being item 6, which is in the following terms:

- “6. Such taxation and other matters relating thereto as may be agreed between the Kabaka’s Government and the Government of Uganda,”

Mr. Pandit, for the appellant, argues that if the 1954 Law remained in force after October 18, 1955, then because it had not been the subject of agreement between the Kabaka’s Government and the Uganda Government, it ceased to have validity after October 9, 1962, when the present Constitution came into operation. There are no merits in this argument. In our opinion, s. 74 of the Constitution governs powers conferred on the Legislature of Buganda after the date on which the Constitution came into operation, and has no effect on laws in force at that time, which, as we have endeavoured to show, have continued validity. It is true that by s. 4 (1) of the Independence Order, existing laws are to be construed with such modifications, adaptations, qualifications and exceptions as are necessary to bring them into conformity with the Order, but it is clear, in our view, that the injunction relates purely to the construction of any existing law and does not impose upon any such law a condition precedent to its validity.

We are therefore, in short, of the opinion that s. 74 of the Constitution has no effect upon the 1954 Law.

Finally, we consider the question of the effect of s. 74 (1) of the Constitution on the 1962 Law.

It is clear from the terms of that section, read in conjunction with item 6 of Part I of Sch. 7 to the Constitution, that the power of the Legislature of the Kingdom of Buganda to make laws relating to taxation and other matters relating thereto is confined to those taxation and other related matters as have been the subject of agreement between the Kabaka's Government and the Uganda Government.

We are not required to pronounce upon the validity of the 1962 Law or its date of operation, nor are we disposed to do so.

We have no evidence before us on which we can decide whether any such agreement as we have mentioned has in fact been made between the two Governments concerned, nor, in any event, does it appear relevant for the purposes of the appeal before the judicial adviser to consider the validity of the 1962 Law since, even if that law was not in force at the relevant times, the 1954 Law was, for the reasons we have expressed, in force and provision was there made for the imposition and collection of graduated tax.

Our decision, on the questions framed earlier, is, shortly stated, as follows:

1. Section 26 (3) of the Uganda (Independence) Order-in-Council, 1962, has, at all relevant times, had no effect on the provisions of art. 41 of the Constitution of Buganda so far as those provisions relate to the collection of taxes.
2. The 1954 Law is an existing law to which s. 4 (1) of the Uganda (Independence) Order-in-Council, 1962, applies.
3. Section 74 (1) of the Constitution has no effect upon the 1954 Law.
4. The effect of s. 74 (1) of the Constitution upon the 1962 Law is that, by the terms of item 6 of Part I of Sch. 7 to the Constitution, the agreement of the Kabaka's Government and of the Uganda Government is a necessary prerequisite to the making of that law.

We direct the judicial adviser to dispose of the appeal in accordance with our decisions.

Each party will pay his own costs of the reference.

*Direction to the judicial adviser to dispose of the appeal accordingly.*

For the appellant:

*SV Pandit*

*SV Pandit, Kampala*

For the respondent:

*Walter Jayawardena QC and Paul Jayarayan*

*Paul Jayarayan, Kampala*

As amicus curiae:

*MJ Starforth (Solicitor-General, Uganda)*

*The Solicitor-General, Uganda*

**Re an Application by Bukoba Gymkhana Club**



[1963] 1 EA 478 (HCT)

**Division:** High Court of Tanganyika at Mwanza  
**Date of judgment:** 11 April 1963  
**Case Number:** 7/1962  
**Before:** Reide J  
**Sourced by:** LawAfrica

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[1] *Licensing – Certiorari – Liquor licensing board – Refusal of application by members’ club – Grounds of alleged discrimination – Candidates for membership required to be proposed and seconded – Allegation that such requirement discriminatory – Whether such consideration extraneous to decision of board – Application for writs of certiorari and mandamus – Liquor Licensing Ordinance, s. 5, s. 6, s. 9, s. 10 and s. 40 (T.) – Liquor Licensing Act, 1953 (U.K.).*

[2] *Certiorari – Liquor licensing board – Refusal of application by members’ club – Grounds of alleged discrimination – Candidates for membership required to be proposed and seconded – Allegation that such requirement discriminatory – Whether such consideration extraneous to decision of board – Whether order of board a “speaking order” so as to warrant issue of writ – Liquor Licensing Ordinance, s. 5, s. 6, s. 10 and s. 40 (T.) – Liquor Licensing Act, 1953 (U.K.).*

### Editor’s Summary

The Bukoba Gymkhana Club which had held a liquor licence for about thirty-four years applied for renewal for six months of its licence under s. 9 of the Liquor Licensing Ordinance to the Bukoba Township Liquor Licensing board. At its half-yearly meeting held under s. 10 *ibid.* the board rejected the application and in its letter of September 13, 1962, informed the club that the application was rejected on the ground that the club’s constitution was “still largely discriminatory”. The club was not represented at this meeting as the Ordinance did not require an applicant to be present, nor was there any suggestion that any recent changes had been made in the club’s rules. At a subsequent meeting of the board at which members of the club were present, it emerged that the board’s objection to the issue of a licence was based largely on the fact that applicants for membership of the club had to be proposed and seconded by a member. The president and trustees of the club thereupon applied to the High Court for the issue of a writ of certiorari to quash the order of the board rejecting the club’s application for the grant of a club licence and also for a writ of mandamus that the board hear and determine the application according to law. The grounds on which the applicants relied were, *inter alia*, that the board (a) had failed to hear and determine the application according to law and had failed to act judicially, (b) in purporting to determine the application had failed properly to exercise the discretion vested in them by the Ordinance and (c) in purporting to determine the application were actuated by or purported to be actuated by extraneous circumstances, namely, the rules providing for election of members to the club. For the board it was contended that the writs should not issue because (a) the board was “an administrative rather than a judicial body” and therefore its determinations could not be challenged, (b) the board had an “unfettered discretion” to reject an application for a licence and (c) the board’s order not being a “speaking order” the court could not on certiorari enquire whether it had come to a right conclusion on the facts. It was further argued that if the proceedings were regular upon their face, and the board had jurisdiction, the

court could not grant certiorari on the ground that the board had misconceived a point of law, and could not purport to exercise an appellate jurisdiction by varying the board's order. The substantial issue at the hearing

was the meaning of the word “discrimination” in the context of this case. The court was of the opinion that the only meaning that could be given to it was that candidates wishing to become members of the club had to be proposed and seconded, and it was solely on the footing of this meaning that the application was considered.

**Held –**

- (i) the alleged discrimination was not discrimination in any ordinary sense of the word and was neither improper nor unfair, and was not a proper ground for the exercise of a board’s discretion under s. 6 of the Ordinance.
- (ii) the rejection by the board of the application for a licence, on the ground that the club’s constitution was largely discriminatory where no discrimination in any ordinary sense existed at all, was more than a failure properly to exercise an existing discretion or a mistaken exercise of such a discretion; there was no matter before the board on which a discretion could be exercised, nor were the licence applicants given the opportunity to present their case or to meet the board’s objection.
- (iii) although the board had no duty to hear an applicant for a licence against an intended refusal, yet bearing in mind that the club had held a licence for thirty-four years, and had neither made any recent alteration in its rules, nor, so far as was known, had been notified of the board’s intention to refuse a licence on this occasion, the out-of-hand refusal constituted another failure of natural justice.
- (iv) the grant or refusal of a licence by the board was a judicial act.
- (v) wherever the legislature used the word “discretion” in connection with the board’s powers, either with or without qualifying words or phrases, then if the board failed to exercise its discretion judicially, or acted capriciously or unreasonably, the prerogative writs could be invoked.
- (vi) the board’s “order” should be considered as consisting of its letter of September 13, 1962, and its explanation to the club members of October 4, 1962, and so as being a “speaking” order.
- (vii) the question whether the defects in the board’s procedure or the form of the order were such as to enable a court to proceed by certiorari on those grounds did not affect the court’s power and duty to grant certiorari in proper cases where there had been a failure to exercise a discretion judicially or a failure of natural justice.
- (viii) the board’s decision was not only influenced by, but was indeed based on the fact that the club’s rules provided that candidates for membership must be proposed and seconded by members; that fact was a consideration extraneous to the proper scope of the exercise of the board’s discretion.
- (ix) the Ordinance imposed on the board a duty to grant or refuse licence applications in accordance with law and in the exercise of a judicial discretion.

Order as prayed.

**Cases referred to in judgment:**

- (1) *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1947] 2 All E.R. 680.
- (2) *R. v. Woodhouse*, [1906] 2 K. B. 501.

- (3) *Sharp v. Wakefield*, [1891] A.C. 173.
- (4) *Healey v. Ministry of Health*, [1954] 3 All E.R. 449.
- (5) *R. v. Nat Bell Liquors*, [1922] 2 A.C. 128.
- (6) *R. v. Port of London Authority*, [1919] 1 K. B. 716.
- (7) *R. v. Metropolitan Police Commissioners*, [1953] 2 All E.R. 717.

## Judgment

**Reide J:** This is an application for the issue of a writ of certiorari to remove into the High Court and to quash an order of the Bukoba Township Liquor Licensing Board (which I will call “the board”) rejecting an application by the Bukoba Gymkhana Club (which I will call “the club”), for the grant under the Liquor Licensing Ordinance (which I will call “the Ordinance”) of a “club licence” and also for a writ of mandamus that the board hear and determine the application according to law. Although I do not think the matter is explicitly stated anywhere, it has been assumed throughout these proceedings that the licence application (a term I will use to distinguish it from the application for the writs) is for a full “club licence” as distinct from a “club beer licence”.

On March 8, 1963, I made an order that the writs of certiorari and mandamus should issue as prayed, and I awarded the applicants their costs. I did not at that time set out my reasons for the order beyond intimating that they were, *inter alia*, that the board had a duty to act judicially in the exercise of its discretion in deciding whether the applicants’ licence should be granted or not, that it had failed in that duty in finding that the club rules relating to membership were “discriminatory” in any sense which entitled the board to reject the application on the grounds of discrimination and in rejecting the application without first hearing the applicants, and that these matters constituted a failure of natural justice. I now give my reasons.

The applicants are Messrs. J. R. Lumsden, D. R. Williams and K. H. Park, the first of whom is the president and the other two of whom are trustees of the club suing on their own behalf and on behalf of the club members.

The applicant’s statement in support of the application and Mr. Lumsden’s affidavit are both imprecise and incomplete. Mr. Mann, the learned advocate for the applicants, concedes this, but submits that the reason for it is that Mr. Lumsden found the board’s proceedings themselves vague and difficult to understand. However, the statement, affidavit and annexures filed in the application are the only documents before the court from which the relevant facts can be ascertained. No counter-affidavit has been filed, and Mr. MacLeod, State Attorney, who appeared for the attorney-general on behalf of the respondent, has conceded that the facts set out and alleged in these documents are correct, and has argued his case on that footing.

The agreed facts, then, are that the club, which has held a liquor licence for about thirty-four years, made its application for a six-monthly renewal of that licence in the usual way under the provisions of s. 9 of the Ordinance, and that this application came before the board at its half-yearly meeting under the provisions of s. 10. It is not suggested that any recent changes had been made in the club rules. The club was not represented at this meeting and the Ordinance makes no reference to the right of a licence applicant to be so represented. The first that the applicants heard of the fate of the licence application was a letter from the secretary of the board dated September 13, 1962, which reads as follows:

### “CLUB LIQUOR LICENCE

“I regret to have to convey the information that the Bukoba Township Liquor Licensing Board has rejected your application for a liquor licence in the allegation that your constitution is still largely discriminatory.

“As the board had firmly insisted on this move nothing could be done.

“I have been in contact with your vice-president and first advised him that an appeal should be made to the permanent secretary, Ministry of Local Government, but after consultation with the local government officer

here I trust the regional commissioner could rightly intervene.

“Please write to him and request him to take necessary steps. I shall be at his disposal for consultation.”

There is no indication as to what is meant by the phrases “largely discriminatory” and “nothing could be done”. The letter does not suggest that the board was in doubt whether to grant the licence application or not, or that it was considering whether (subject to such representations as the club might wish to put forward) it should reject it. It is an out-and-out rejection. It is true that the letter suggests that the applicants should write to the regional commissioner, who, it is suggested, could “rightly intervene” (in fact he has no power to do so), but that in no way affects the finality of the rejection.

On October 4, Mr. Lumsden and two other club members attended another meeting of the board. All that we know of what happened at this meeting is derived from the affidavit, where Mr. Lumsden says:

“I and other officials of the club attended, and from observations that were made at this meeting it would appear that the objection to the issue of a club liquor licence was based largely on the fact that applicants for membership of the club had to be proposed and seconded by a member,”

and that the board granted the club a temporary licence expiring on October 18. One can only guess at the reasons why this was done; it was possibly to give the club an opportunity of considering whether it would amend its rules regarding membership. Section 5 (10) of the Ordinance provides that the chairman of the liquor licensing board shall

“keep a record of any proceedings or any decisions of the board over which he presides”,

but if any such record exists its terms are not known to the court.

As a result of the board’s rejection of the application, the club was without a licence from the first day of the half-yearly period in respect of which it had been made, i.e. October 1, 1962, until October 4 or 5. On October 18, 1962. After that date the club was again without a licence until December 5. On this latter date the court at the respondent’s request granted an adjournment of the hearing of this application on the terms that the board should issue a licence to expire in the normal way (that is, on March 31, 1963) subject to its being surrendered on the day before the first determination of this application.

The grounds on which the order for the issue of the writs was sought are these:

- “(1) The board failed to hear and determine the said application according to law.
- (2) the board failed to act judicially in their determination.
- (3) The board in purporting to determine the application failed properly to exercise discretion vested in them under the provisions of the Intoxicating Liquors Ordinance as amended.
- (4) The board in purporting to determine the application were actuated by or purported to be actuated by extraneous circumstances, namely the rules providing for election of members to the said Bukoba Gymkhana Club.”

It will be convenient to set out Mr. Lumsden’s affidavit in full.

“I, John Robert Lumsden, of P.O. Box 40, Bukoba, make oath and say as follows:

- (1) I am the president of the Bukoba Gymkhana Club.
- (2) Derrick William Edwards and Kenneth Harvey Park are trustees of the said club.
- (3) The Bukoba Gymkhana Club has been in existence for approximately thirty-four years and during such time has held a normal club liquor licence.
- (4) On a date prior to September 8, 1962, the said club applied for the renewal of their club liquor licence, in the normal way, but on the said September 8, 1962, the application was rejected, and by a letter dated September 13, 1962, the secretary of the Bukoba Gymkhana Club was informed that the board had rejected the application of the club for a liquor licence – in the allegation that your constitution is still largely discriminatory'. (Copy of the said letter is annexed hereto and marked 'Exhibit A'.)
- (5) I understand and verily believe that on the determination of the application of the club for a liquor licence there was present at the meeting an objector to the issue of such licence but at that time no member or official of the club had been invited to attend in order to answer any objections that might be made.
- (6) Upon receipt of the said letter annexed hereto and marked 'Exhibit A' a letter (annexed hereto and marked 'Exhibit B') was sent by the secretary of the club to the secretary of the board, and as a result of that letter and also of the representations made by the acting administrative secretary of the West Lake region, a further meeting was held on October 4, 1962, and I and other officials of the club attended and from observations that were made at this meeting it would appear that the objection to the issue of a club liquor licence was based largely on the fact that applicants for membership of the club had to be proposed and seconded by a member.
- (7) Consequent upon that meeting a temporary licence was issued which expired on October 18, 1962, and in the result the Bukoba Gymkhana Club is without a liquor licence under the Intoxicating Liquors Ordinance.
- (8) I annex hereto an extract of the rules relating to membership (marked Exhibit 'C') from which it will be seen that there is nothing discriminatory in the rules of the club."

The exhibit "A" referred to has already been quoted. Exhibit "B" is as follows:

"Bukoba Gymkhana Club  
P.O. Box 40,  
Bukoba.  
September 14.

"The Secretary,  
Bukoba Town Liquor Licensing Board,  
Bukoba.

#### CLUB LIQUOR LICENCE

Dear Sir,

Thank you for your letter of September 13. At the March meeting of the liquor licensing board, the rules of the Gymkhana Club were produced, and the board apparently satisfied that the club constitution was no longer discriminatory, because the licence was issued. I assure you that no change has been made to the club constitution since that meeting, and I reiterate that there is nothing in the club constitution to limit membership



to members of any race or combination of races. Indeed we have members of all three nationalities in the club at present.

“I therefore ask you, on behalf of the club committee, to reconsider your decision in the light of these facts. I will be glad to go over the club rules with the board if they feel that they would like any point explaining. Will you please treat this letter as a formal appeal against the board’s decision.

“I will be grateful if you will deal with this matter as soon as possible, as we do not want to have to close the club bar after September 30.

Yours faithfully,

Hon. Sec., Bukoba Gymkhana Club.”

In fact there is no machinery for appeal, formal or otherwise, against the board’s decision, and the club’s only remedy lies by way of this application. Exhibit “C” is as follows:

“EXTRACT FROM THE RULES OF THE  
BUKOB GYM KHANA CLUB

Membership

“Rule 4. Only persons who have attained the age of eighteen years may become members of the club.

The membership of the club shall comprise:

1. Ordinary members, who may be town or suburban members.
2. Country members.
3. Temporary members.
4. Honorary members.
5. Honorary life members.

Election

“Rule 6. All members shall be elected by the elected committee of the club. Each candidate for membership except as hereinafter provided in these rules shall be proposed by one ordinary member and seconded by another in the following form:

The Honorary Secretary,  
The Bukoba Gymkhana Club,  
P.O. Box 40,  
Bukoba.

Sir,

I desire to become an Ordinary/Country/Temporary member of the Bukoba Gymkhana Club, and I hereby agree, if elected, to abide by the rules of the said club.

I declare that I have not been refused membership or been excluded from any club in East Africa.

I have been a member of the following club:

The following particulars are correct:

Name (in block capitals) .....

Address .....

Would you be prepared to accept office on the committee? .....  
Occupation .....  
Nationality .....  
Signature .....

Note: Please give full postal address.

The above candidate(s) is/are personally known to us and we believe him/her/them to be a suitable person(s) to be elected a member(s) of the Bukoba Gymkhana Club.

Proposer .....  
Seconder .....

Such application shall be posted on the Bukoba Gymkhana Club notice board for at least ten days previous to the ballot. Election shall be by ballot of the committee. One black ball in five shall exclude.”

The remainder of exhibit “C” is concerned with fees and subscriptions and is not material to the application.

Section 6 of the Ordinance provides that:

- “6. An application for a licence shall be heard by the board having jurisdiction over the area within which the premises for which a licence is sought are situated and such board may in its discretion grant or refuse such application.”

Section 9 is concerned with notification of application for a licence and reads:

- “9. (1) A person who desires to apply for a licence, other than a temporary licence, shall send his application in quadruplicate to the board in the prescribed form and shall pay the prescribed fee.
- (2) The board shall send one copy of the application to the senior officer of police and one copy to the medical officer of health, or to the medical officer performing the functions of medical officer of health in the area within which the board has jurisdiction and before hearing the application, shall cause a copy of it to be posted at the district or council office for at least fourteen days.
- (3) The police officer aforesaid shall report to the board on all matters material to the application. Such report shall be in writing but the board may in its discretion require the presence of such police officer at the hearing of the application.
- (4) A board may receive and consider any report made to it by the medical officer of health or the medical officer performing the functions of medical officer of health.”

Section 10 (1), s. 11 and s. 20 are as follows:

- “10 (1) Each board shall appoint a day in the first half of March and September for hearing applications for licences for the half year commencing on the first day of the following April or October as the case may be, and may in its discretion hear an application at any other time.”
- “11. (1) Any person may object to the granting of a licence.
- (2) Every objection to the granting of a licence shall be either –
- (a) made in writing to the chairman of the board prior to the hearing of the application, and

if so made, notice in writing of the grounds of the objection shall be served by the objector on

the applicant, at least three days before the hearing of the application; or

(b) made at the hearing of the application.

- (3) Where an objection is made in the manner specified in para. (a) of sub-s. (2) and the objector fails to serve notice of the grounds of the objection in the manner therein specified or where an objection is made in the manner specified in para. (b) of that sub-section the board shall, if so required by the applicant, adjourn the hearing of the application for a period not exceeding seven days to enable the applicant to answer the objection.

- “20. (1) A board may require an applicant for a licence or for the transfer or removal of a licence to attend before it and be examined on oath concerning any matter material to the application.
- (2) For the purpose of this section the chairman of the board shall have power to administer an oath.”

Section 40 is concerned with club licences and is as follows:

- “40. (1) A club licence may be either –
- (a) a members’ club licence; or
- (b) a proprietary club licence.
- (2) A members’ club licence shall authorize the supply of intoxicating liquor, being the property of the members of the club, in any quantity to the members of the club and their guests on any day and at any time in the day or night.
- (3) . . . . .
- (4) No premises shall be considered to be a club of either description where any persons, other than the members and their invited guests, are allowed entry or accommodation or wherein any persons, other than the members, are charged or permitted to pay for any intoxicating liquor, refreshment or accommodation obtained therein.
- (5) A club licence shall only authorize intoxicating liquor to be supplied on –
- (a) the premises specified in the licence; or
- (b) in the case of a members’ club, premises temporarily occupied by the club, if at least forty-eight hours’ previous notice has been given to a police officer not below the rank of sub-inspector.
- (6) If on any premises occupied by a club any intoxicating liquor is supplied to any person, whether a member or not, except under the authority of a licence and in accordance with the conditions of the licence and the provisions of this Ordinance, the person supplying the liquor and every person authorizing its supply shall be deemed to have sold intoxicating liquor without a licence and shall be guilty of an offence:

Provided that no licence shall be required under this Ordinance for the supply of intoxicating liquor to the members of a members’ club where the liquor is the property of the members and the cost thereof is debited equally to all the members consuming the liquor and no extra charge is made to any individual for liquor consumed by him.

- (7) A members’ club licence shall be applied for by and issued to the secretary or some other responsible officer on behalf of the club and no transfer of the licence shall be necessary by reason only of any change in the holder of the office.

- (8) . . . . .
- (9) In this section a member of a club means –
  - (a) in the case of a members' club a person who has been duly elected or accepted for election in accordance with the rules of the club or who has been admitted as a temporary member of the club;
  - (b) in the case of a proprietary club, a person who has been accepted as a member of the club and who has paid any membership fee or subscription required of him by the rules of the club.
- (10) A board may require an applicant for or a holder of a club licence to produce to its satisfaction such information as the board may reasonably require as to any of the matters mentioned in sub-s. (9), including the rules of the club.
- (11) A board may revoke any licence granted to a club under the provisions of this section if it has good reason to believe that the club is in the habit of supplying liquor to persons who are not bona fide members of the club or their guests or, in the case of a members' club, that the liquor sold is not the property of the members of the club.
- (12) . . . . .
- (13) . . . . .”

(Sub-sections (3), (8), (12) and (13) are concerned with proprietary clubs.)

Mr. Mann originally urged two grounds for the application. The first was that, even supposing that the club rules were “discriminatory” the board had no discretion to reject the licence application on those grounds. He suggested indeed that the discretion was limited to such matters as arose in connection with s. 40. He has now abandoned that ground, which I am satisfied has no merits, and about which I need only say that I am of the opinion that the exercise of the discretion conferred upon a board under s. 6 of the Ordinance in deciding whether to grant a club licence is not so limited, and might properly extend to questions of “discrimination” in certain circumstances. I will return to this question in a moment.

Mr. Mann’s second ground is that, assuming that the board has a discretion to refuse a licence to a club because its rules are improperly discriminatory, then there was no element of discrimination in the club rules upon which the board could exercise that discretion in this case, that the board must have known that there was so, and that it did not arrive at its decision judicially.

It becomes necessary at this stage to determine what the board must be taken to have meant by its use of the word “discriminatory”, and its derivatives, in the context of this case. The word does not ordinarily bear a pejorative sense here, but there can be no doubt that the board was using it in such a sense to connote “unfair” or “improper” discrimination.

I am anxious to make it clear at once that there are not in this case, from first to last, any grounds for suggesting that the alleged “discrimination” contains any element of racial discrimination (although Mr. MacLeod has tried to persuade me that it does so). I emphasise this point because the word “discrimination” standing by itself in connection with a matter such as this often does mean or involve the idea of “racial discrimination”, and also because it might more easily be thought to have that meaning here since the representative club members concerned are all Europeans and the members of the board all Africans. The only meaning, however, that can be given to the word here is “discriminatory in that members have to be proposed and seconded”, and it is solely on the footing of that meaning that I am considering this application.

At first sight such “discrimination” would not seem to be discrimination in any ordinary or significant sense at all. Mr. MacLeod has, however, argued that it may properly be called so because the requirement that a candidate for membership must be proposed and seconded by members means that all persons who may wish to join the club may not have an equal opportunity of doing so, since they may not know two members who were prepared to propose and second them, and that this inequality of opportunity, he submits, constitutes “discrimination”. (I will remark in passing that no submission has been put forward regarding the ballot procedure mentioned in the extract from the club rules, whereby candidates for membership will be disqualified by too many black balls.)

Mr. MacLeod has submitted, in short, that any rules relating to membership which do more than lay down the amount of the entrance fee and the subscription are “discriminatory” in the sense in which the word has been used in rejecting the licence application. I would however comment that it would appear to me equally “discriminatory” to have any rules about admission or subscription fees, since there may be many people who wish to join the club but cannot afford to do so, and in Mr. MacLeod’s sense they too are being discriminated against. Such a definition is I think bizarre, and certainly wrenches the word out of its ordinary meaning. On this footing all members’ club rules are in part discriminatory. Members’ clubs may roughly be divided into two kinds. Some exist to serve the interests of particular classes of the community or of persons having special interests in common. The rules of such clubs are “discriminatory” in Mr. MacLeod’s sense and, if they were not, the objects of the club concerned would be defeated. For example, a ladies’ sewing guild discriminates in this sense against all males, and a Sikh railway workers’ club discriminates against all persons not of that faith or employment. There are, I believe, clubs in other countries the membership of which is confined to men who have made parachute landings, or who are over a certain height. In this sense anyone who does not fulfil those qualifications is being discriminated against. The other sort of club, to which I suppose the Bukoba Gymkhana Club belongs, is that whose purposes are social and recreational. The word “discrimination” when applied to qualifications for membership of such clubs must clearly be given a different meaning. I am not going to say that in the multi-racial community in which we live, and in the context of political and social feeling obtaining in Tanganyika, rules discriminating, e.g. on grounds of race or creed, might not in some cases be valid grounds for the rejection of a licence application. That question is not before me and I pass no opinion on it. It is clear, however, that a club whose purposes are social and recreational has for one of its objects the creation and maintenance of a membership of persons who in a wide sense have common interests and whose company will be agreeable to one another. It is to my mind most natural and reasonable that such a club should be able to exercise some control to ensure that these legitimate objects are achieved, and the usual, to my mind perfectly proper, way of doing this, is by a procedure of proposing and seconding candidates and, possibly, of ballot. This however, is what Mr. MacLeod says the board means by discrimination, and I must take the word as he defines it. My only concern now is to make it clear that in my view such discrimination is not discrimination in any ordinary sense of the word, is neither improper nor unfair and is not a proper ground for the exercise of a board’s discretion under s. 6.

“The writs of certiorari and mandamus” (says Halsbury (3rd Edn.), Vol. 11, p. 53) “are a means of controlling . . . bodies of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially . . . The degree of control which can be exercised is limited: provided that the tribunal keeps within its jurisdiction

and obeys the rules of natural justice, and refrains from setting out in its record the reasons for its decision, the court cannot interfere.”

And at p. 62, with reference to certiorari:

“When the inferior tribunal has jurisdiction to decide a matter it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction. If, however, an administrative body comes to a decision which no reasonable body could ever have come to, it will be deemed to have exceeded its jurisdiction, and the court can interfere.”

In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1), [1947] 2 All E.R. 680, the plaintiffs appealed from a refusal of the High Court to grant a declaration that a condition attached to a permission for Sunday performances granted by the defendants, the licensing authority, was ultra vires. On the special facts of that case the appeal was dismissed, because, as Lord Greene, M.R., said at p. 683:

“It is perfectly clear that the local authority are entrusted by Parliament with the decision on a matter on which the knowledge and experience of the authority can best be trusted to be of value. The subject-matter with which the condition deals is one relevant for its consideration. It has considered it and come to a decision on it, and the courts were not prepared to find that the decision in that case was unreasonable.”

In the course of his judgment, however, Lord Greene discussed the question of the principles on which a local authority must exercise its discretionary powers, and the circumstances in which the court will interfere with the exercise of those powers. He said at p. 682:

“When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.

What, then, are those principles? They are perfectly well understood. The exercise of such discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion, ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act makes it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word ‘unreasonable’. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It is frequently used as a general description

of the things that must not be done. For instance a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably' . . . it might be useful to summarize once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of a local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which the Parliament has confided in it."

Dealing with mandamus, Halsbury (op. cit., p. 64) says:

"The High Court will not question by mandamus the honest decision of the tribunal, even though erroneous in matters of fact or law, on the matters within its jurisdiction. Where, however, a tribunal has in substance shut its ears to the application made to it and has determined on an application not made to it, it will be held to have refused to exercise its jurisdiction, and a mandamus will issue ordering it to hear and determine. Thus in the case where certiorari or prohibition may not lie, the proceedings being regular on their face and the tribunal having jurisdiction, mandamus to hear and determine may none the less issue to the tribunal on this ground, if the tribunal has been influenced by extraneous considerations or rejected legal evidence. In such a case even though they have purported to hear and determine the case, they will be deemed not to have exercised their jurisdiction."

The circumstances obtaining here were such that the application for both writs must succeed. There was both an excess of jurisdiction and a failure to exercise jurisdiction for which grants of certiorari and mandamus respectively were appropriate. The board is a body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially. It rejected the licence application out of hand on the ground that "the constitution is still largely discriminatory" where no discrimination in any ordinary sense existed at all, and certainly not in any pejorative sense, which could give rise to the exercise of a discretion. That was more than a failure properly to exercise an existing discretion, or a mistaken exercise of such a discretion: there was no matter before the board on which a discretion could be exercised. No opportunity was given to the licence applicants, to present their case or to meet the board's objections. It has been suggested by the advocate for the applicants that the board, in rejecting the application as it did was not acting bona fide. I make no finding about that, but I do find that to reject the licence application for the reason which it gave and in the way that it did was clearly "unreasonable" in the sense in which that word is used by Lord Greene in the *Associated Provincial Picture Houses* case (1), and the board's refusal of the licence application on these imaginary grounds was clearly a failure of natural justice. Further although the board has no duty to hear a licence applicant against an intended refusal, yet, bearing in mind that the



club had held a licence for thirty-four years, and had neither made any recent alteration in its rules nor, so far as is known, been notified of the board's intention to refuse a licence on this occasion, the out-of-hand refusal constituted another failure of natural justice.

Mr. MacLeod submitted a number of arguments why the writs should not issue. I will deal first with those relating to certiorari. The first is that the board is "an administrative rather than a judicial body" and that therefore the writs cannot issue against its determinations. Since no appeal lies to the court against its determinations, this would mean in effect that the club has no remedies at all. I should be most loth and unhappy to find that the decisions of liquor licensing boards were (I imagine, uniquely) subject to no control or review by the courts, but I am happily quite satisfied that that is not the case. Of course the board is an administrative body, but that does not preclude it from being as it is, a

"body of persons having legal authority to determine questions affecting the rights of subjects"

as well, and so one amenable to the writs. As Halsbury (op. cit., para. 114) says:

"The orders . . . will lie to bodies and persons other than courts stricto sensu."

In *R. v. Woodhouse* (2), [1906] 2 K.B. 501 at p. 512, Vaughan Williams, L.J., said:

"I ask myself, therefore, the question whether the licensing justices in granting or refusing a licence do a judicial act. In my opinion the grant or refusal of such a licence is a judicial act, and the judgment of Lord Halsbury in *Sharp v. Wakefield*, [1891] A.C. 173, seems to be an authority for this view; for he says, as appears on p. 179 of the report, that 'an extensive' power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something has to be done according to the rules of reason and justice, not according to private opinion; according to law, and not humour; it is to be, not arbitrary, vague, and fanciful, but legal and regular. This view seems to me to be confirmed by old and recent decisions. It is impossible to read under the title 'certiorari' in the Burn's Justice of the Peace the list of the cases in which a writ of certiorari has been granted and the grounds for granting it without seeing that in practice a certiorari has issued in cases in which it is impossible to say that there was a court and a 'lis' ",

which is as clear an indication as one could look for that a liquor licensing board is a body amenable to the writs. Mr. MacLeod has sought to show, by drawing my attention to a number of differences of detail (which it is not necessary to particularise) between the provisions and operation of the English Liquor Licensing Act, 1953, and the Tanganyika Liquor Licensing Ordinance, that liquor licensing boards in this country have what he calls an "administrative flavour", and that their procedure conforms more closely to that of a purely administrative body, and less so to that of a court than is the case in England. That may be so, but such differences certainly do not serve to deprive liquor licensing boards of those judicial elements, already defined, which render such bodies amenable to the writs.

Mr. MacLeod next submits, as another reason why the writs cannot issue against the board, that it has an "unfettered discretion" to reject a licence

application. In support of this surprising proposition he relies on the wording of s. 6 of the Ordinance which empowers a board to grant or refuse an application “in its discretion” without particularising that discretion; and he refers to s. 13 and s. 17 which empower a board to attach to a licence “such conditions as it thinks expedient” and to transfer or remove licences “in its discretion” “subject to such conditions as it may see fit to impose”. The wording of these three sections, he suggests, indicates that the “discretion” which the legislature intended to confer upon the board under s. 6 is absolute, or “unfettered” and so not amenable to the writs. No such construction of the words “in its discretion” is tenable. I am not certain that the phrase “unfettered discretion” is not self-contradictory, or that a “discretion” which does not have to be exercised within *some* limits is a discretion at all. Be that as it may, I cannot doubt that wherever the legislature has used the word “discretion” in connection with the board’s powers, either with or without qualifying words or phrases, then, if the board fails to exercise its discretion judicially, or acts capriciously or unreasonably the writs may be invoked. If I understood Mr. MacLeod aright, however, he later, in part at any rate, abandoned this position. He conceded that there might be forms of discrimination which the board would have no discretion to consider in determining whether or not to grant a licence but he submitted that the discrimination which the board purported to have found in the club rules was “racial discrimination” or at any rate, a sort of discrimination which was a fit subject for the board’s discretionary powers. I have already dealt with that matter, and need not recapitulate my findings. Mr. MacLeod went on accordingly to submit that the board’s order was not a “speaking” order (that is an order which “tells its own story”) and that therefore this court could not on certiorari enquire whether the board had come to a right conclusion on the facts, as it might do if the order were “speaking”; further that if the board had a discretion to inquire whether the club rules were improperly discriminatory (and I am satisfied that it had) so that that question was a part of the very matter or issue which the board had to determine, and not merely a collateral question, then certiorari could not be granted; further, that if the proceedings were regular upon their face, and the board had jurisdiction (and I am satisfied that was the case here), this court could not grant certiorari on the ground that the board had misconceived a point of law, and could not purport to exercise an appellate jurisdiction by varying the board’s order. With those statements of the law I am in agreement, though I incline to think that the board’s “order” should be considered as consisting of (a) its letter of September 13, and (b) its explanation to the club members of October 4, and so as being a “speaking” order.

Authority for these statements is to be found in *Healey v. Ministry of Health* (4), [1954] 3 All E.R. 449 at p. 454, where Parker, L.J., said:

“It is however contended that once the Minister has determined the matter the High Court has jurisdiction, in the absence of express words in the regulation to the contrary to go behind the determination and to hold that it was wrong in law even though no error of law appeared on the face of the determination. In other words it is contended that the court’s supervisory jurisdiction is wide enough to enable it to declare a determination to be unlawful, in the sense of being wrong in law even though the matter was not one which could form any ground for moving for an order of certiorari. This is at once a novel and far-reaching contention – novel in that so far as I know such a jurisdiction, if it exists, has never been invoked and far-reaching in that, if valid, awards of arbitrators and decisions of statutory tribunals, such as rent tribunals, would be open to review, even though there was no error on the face of such awards or decisions. For the reasons set out below, however, I find it unnecessary to consider this contention.

“... The issue to be tried is whether the Minister having made a determination, this court has jurisdiction by declaration not to declare that his determination is null and void or that it should be quashed, but to make another determination and one in the opposite sense to that made by the Minister. In my opinion the court has no such jurisdiction. To hold otherwise would be to invest the court with an appellate jurisdiction, as opposed to a supervisory jurisdiction, which it certainly has not got. A right of appeal is the creature of statute, and the regulations give no right of appeal. Further, the absence of such words as ‘whose determination is final’ or ‘whose determination shall not be called in question in any court of law’ cannot preserve a jurisdiction which apart from such words did not exist.

“The judgments of the Court of Appeal in *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 All E.R. 122, point the distinction between an appellate jurisdiction and a supervisory jurisdiction. In that case the court were considering the scope of the remedy by way of certiorari under the court’s supervisory jurisdiction, and Singleton, L.J., expressed his view in these words at p. 126:

“The decision of the tribunal was a “speaking order” in the sense in which that term has been used. The court is entitled to examine it, and if there be error on the face of it, to quash it – ... ‘not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty’, as Lord Cairns said in the *Walsall* case (4 App. Cas. at p. 39).

*R. v. Nat Bell Liquors* (5), [1922] 2 A.C. 128, is an earlier case in which Lord Sumner made the same point as in *Healey’s* case (4) when he said (at p. 142):

“It appears to their lordships that, whether consciously or not, these learned judges were in fact rehearing the whole case by way of appeal on the evidence contained in the depositions, a thing which neither under the Liquor Act nor under the general law of certiorari was it competent to them to do. As, however, the majority in the Supreme Court proceeded on a view of certiorari, which purported to justify this mode of dealing with the evidence, their lordships will consider the case in that light without disposing of it as a case of entertaining an appeal, where no appeal lay.”

I have thought it proper to set out Mr. MacLeod’s submissions on this aspect of the case and to indicate my agreement with certain propositions of law involved. I must now make it clear that these matters are not pertinent to the decision which I reached in this case. There is no question here of this court’s being asked to exercise an appellate jurisdiction, or to vary the board’s order; the applicants seek only that it should be set aside. The question whether the defects in the board’s procedure or the form of the order are such as to enable a court to proceed by certiorari on those grounds does not affect the court’s power and duty to grant certiorari in proper cases where there has been a failure to exercise a discretion judicially or a failure of natural justice. Halsbury (para. 119, op. cit.) says:

“Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior court will not grant the order of certiorari on the ground that the inferior tribunal had misconceived a point of law,”

that is, that that ground will not suffice for the grant, though there is nothing to preclude the issue of the writ on other grounds.

Finally, Mr. MacLeod has submitted that in any event the board acted reasonably and that no failure of justice has resulted to the club. I can deal with this point very shortly. I have already discussed the question of reasonableness. As to a failure of justice, Mr. MacLeod has suggested that if indeed any has occurred it was limited to the period between September 30, and October 4, when the club had no licence, and that that was a very short period, and was not substantial enough in any event to constitute an injustice of which a court should take notice. There is no merit in this submission. First Mr. MacLeod has apparently overlooked the fact that the club was also without a licence from October 18 until November 27, when it was made a condition of the adjournment of the hearing of this application that a licence be granted until the first determination of the application. Secondly the question whether there has been a failure of justice does not depend on the period during which the club was unlicensed or the inconvenience to which it has been put in bringing these proceedings. The failure of the justice derives from and is created by the board's improper determination of the application. That determination gave rise, at the moment it was made, to a right to a remedy by way of the writs, no matter for how short a period the board's order was in operation.

As regards mandamus, Mr. MacLeod referred to *R. v. Port of London Authority* (6), [1919] 1 K.B. 176, where Bankes, L.J., said (at p. 183):

"There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways: there may be an absolute refusal in terms, or there may be conduct amounting to a refusal."

and submitted that since there was no such refusal here,

"the High Court will not question by mandamus the honest decision of a tribunal, even though erroneous in matters of fact or law, on matters within its jurisdiction".

(Halsbury, op. cit., p. 64). The fallacy in that submission is that, as Halsbury goes on to say:

"Where, however, a tribunal has in substance shut its ears to the application made to it and has determined on an application not made to it, it will be held to have refused to exercise its jurisdiction, and a mandamus will issue ordering it to hear and determine. Thus, in a case where certiorari or prohibition may not lie, the proceedings being regular on their face and the tribunal having jurisdiction, mandamus . . . may none the less issue to the tribunal on this ground, if the tribunal has been influenced by extraneous consideration";

and *R. v. Port of London Authority* (6) is in fact authority also for that proposition. In that case Bankes, L.J., went on to say:

"In the latter case [that is, where there is conduct amounting to a refusal] it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was entitled to take into consideration and those cases where it has heard and determined upon grounds outside and beyond its jurisdiction, but this conclusion may be drawn from decided cases, that there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it. On this point I would refer to the words of Farwell, L.J., in *R. v. Board of Education*: 'If the tribunal has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the

courts cannot interfere; they are not a court of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the courts have regarded them as declining jurisdiction. Again, in *R. v. Bowman*, where licensing justices had allowed their decision to be influenced by extraneous considerations, Wills, J., said: 'There has been no real hearing and the mandamus must therefore go.' "

Those observations seem to me completely in point here. The board's decision was not only influenced by, but was indeed based on the fact that the club's rules provided that candidates for membership must be proposed and seconded by members. That fact was a consideration extraneous to the proper scope of the exercise of the board's discretion.

Mr. MacLeod finally submitted that the board's authority to grant licences was permissive only and did not amount to a duty imposed by law, and that in such a case the writ will not lie. In support of this he cited *R. v. Metropolitan Police Commissioners* (7), [1953] 2 All E.R. 717, where Goddard, L.C.J., said (at p. 719):

"Mandamus will lie to any person who is under a duty imposed by statute or by the common law to do a particular act."

As to this, I will say first that that is not, and was not intended to be, an exhaustive definition of the scope within which the writ operates, and secondly, that it is necessary to distinguish between a duty to grant a licence to a particular applicant and a duty to consider licence applications generally and to grant or refuse them in accordance with law and in the exercise of a judicial discretion. The Ordinance does not impose the first duty upon the board; the second it does.

*Order as prayed.*

For the applicants:

*JS Mann*

*JS Mann, Mwanza*

For the respondent:

*ND MacLeod* (State Attorney, Tanganyika)

*The Attorney-General*, Tanganyika

**Virji N Bhardia v Mrs Kashiben Purshottam Patel**  
[1963] 1 EA 494 (HCT)

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|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 23 May 1963                               |
| <b>Case Number:</b>      | 1/1963                                    |
| <b>Before:</b>           | Biron J                                   |
| <b>Sourced by:</b>       | LawAfrica                                 |

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*[1] Rent restriction – Standard rent – Alternative accommodation found by former landlord – Possession taken by tenant – Payment by former landlord to new landlord – Claim by new landlord for increased rent – Increased rent paid – Payments later reduced by tenant – Claim by tenant that reduced payments are standard rent – Standard rent determined by board – Appeal – Whether payment by previous landlord a premium – Whether premium illegal – What is standard rent on prescribed date – "Premium" – Meaning of "collusive" – Rent Restriction Act, 1962, s. 4, s. 11 and s. 21 (T.).*

### **Editor's Summary**

Until January, 1959, the appellant was the tenant of a landlord who, being then desirous of converting his building to commercial user, found alternative accommodation for the appellant in the building of the respondent. The

landlord through a third party paid the respondent Shs. 2,000/-, whereupon the respondent let a flat to the appellant. The appellant moved into the flat on January 24, 1959, but commenced paying rent as from February 1, 1959. Until the end of January 1961, the appellant paid Shs. 180/- per month when the respondent demanded Shs. 245/- per month as from February 1, 1961. The appellant paid this sum until the Rent Restriction Act, 1962, came into force when the appellant reduced it to Shs. 180/- per month asserting that this was the standard rent because it was the sum paid as from the commencement of the tenancy and particularly on July 1, 1959, which was the prescribed date in the Act. The respondent disputed this, contending that Shs. 180/- per month constituted only part of the rent and that the sum of Shs. 2,000/- paid by the appellant's previous landlord was in fact part payment of the rent in advance for twenty-four months, thereby making the real rent Shs. 250/- per month. The appellant alleged that the sum of Shs. 2,000/- was a premium. On the application of the respondent the Dar-es-Salaam Rent Restriction Board determined the standard rent as Shs. 245/- per month. The appellant appealed from this decision on the grounds, *inter alia*, that prejudice had been caused because the Board made their determination under sub-s. (2) instead of sub-s. (1) of s. 4; that the Board erred in holding that Shs. 180/- was not a proper and genuine rent; that the Board, having found that the sum of Shs. 2,000/- was a premium, should have held that the rent was not affected by this payment and was therefore Shs. 180/- per month; that, having found that the payment was in fact a premium, the Board could not relate it to the rent; that it was not open to the Board in law to find any other figure for the standard rent than the figure actually paid as rent on the prescribed date unless the Board found such payment to be nominal, fictitious or collusive; that the Board erred in not directing itself to the provisions in the Act enabling it to increase the amount of the standard rent from Shs. 180/- per month to any other figure, if the respondent ceased to be the tenant of the premises, and finally that the Board should have ignored the illegal nature of the payment of Shs. 2,000/- and held that the premises were let on the prescribed date at the proper and genuine rent of Shs. 180/- per month.

**Held –**

- (i) the court was satisfied that the complaint that it was “unfair, unjust and against the rules of natural justice” for the Board to make its determination under s. 4 (2) was without any substance.
- (ii) the Board in effect found the Shs. 2,000/- to be part premium and part advance payment of rent, and although the terms “rent” and “premium” were mutually exclusive, there was nothing to prevent a payment being in part the one and in part the other.
- (iii) the Board had found that the rent was Shs. 180/- plus, and not Shs. 180/- only, as alleged by the appellant.
- (iv) the legislature in laying down that the rent of the prescribed date should be adopted as the standard rent intended that such rent should be adopted only if it was a fair and economic rent in relation to the premises, but not if it was a rent peculiar to the parties, whether it was nominal, fictitious or collusive, in its literal and wider sense, that is, a figure agreed between and peculiar to, the parties, but not related to the premises as such.
- (v) the contention that, whatever rent was paid at the prescribed date, however uneconomic or however much affected by the particular relationship between the then landlord and tenant, must be adopted as the standard rent, had no relevance in Tanganyika.
- (vi) the court agreed with the Board that a determination of a standard rent was a finding in rem and that it was not open to the Board to vary the standard rent on account of the personalities or the

particular relationship between the landlord and the tenant.



- (vii) the payment of Shs. 2,000/- was not illegal, but even assuming that it was, the Board's finding that the appellant was also tainted with the illegality was supported and justified by the evidence; apart from this, the determination of the standard rent was a finding in rem and could not be affected by such extraneous personal considerations.

Appeal dismissed.

### Cases referred to in judgment:

- (1) *King v. Earl of Cadogan*, [1915] 3 K.B. 485.  
(2) *Juma Shabani Keshallilla v. R.*, [1963] E.A. 184 (C.A.).

### Judgment

**Biron J:** This is an appeal from the Dar-es-Salaam Rent Restriction Board determining the standard rent of a residential flat at Shs. 245/- per month.

The undisputed facts of the case can be briefly summarised as follows.

Until about the end of January, 1959, the appellant occupied a flat in the building and as a tenant of, one Sahota. Sahota, desirous of converting his building to commercial user, sought alternative accommodation for the appellant. He found such accommodation in the building of the respondent, and on his (Sahota's) paying the respondent Shs. 2,000/- through a third party, the respondent let a flat to the appellant in his building, which was just being completed. The appellant moved into the flat on January 24, 1959, though he commenced paying the rent as from February 1, 1959. The sum he paid as rent was Shs. 180/- per month. He continued paying at such figure until the end of January, 1961, when on the demand of the respondent he commenced paying Shs. 245/- a month as from February 1, 1961. He continued paying at such figure until the coming into force of the Rent Restriction Act (No. 42 of 1962), when he reduced it to Shs. 180/- per month, asserting that that was the standard rent. He based such assertion on the fact that he had been paying such rent as from the commencement of the tenancy and particularly on July 1, 1959, which is the prescribed date in the Act. The respondent disputed this assertion, contending that the Shs. 180/- per month constituted only part of the rent and that the Shs. 2,000/- paid by the appellant's previous landlord, Sahota, was in fact a part payment of rent in advance. Allowing for income tax, such payment was intended as an advance payment for twenty-four months' rent at Shs. 70/- per month. The real rent as from the commencement of the tenancy was therefore Shs. 250/- per month, and this was the rent also paid on the prescribed date. The appellant denied that the Shs. 2,000/- was an advance for rent but asserted that it was a premium, or "key money", or "pugree", as variously termed in the proceedings, and that the agreed rent was in fact no more than Shs. 180/- per month, both as from the commencement of the tenancy and on the prescribed date.

Following an exchange of letters the respondent filed an application in the Dar-es-Salaam Rent Restriction Board for the determination of the standard rent of the flat. The appellant, by his written statement of defence, also prayed for such determination. After hearing the parties and their advocates the Board determined the standard rent at Shs. 245/- per month. It is from this determination that this appeal has been brought.

Numerous and varied grounds of appeal have been lodged and argued, and I propose to deal with them

seriatim.

The first ground of appeal as set out in the memorandum of appeal is:

“The Board did not consider adequately the fact that the relief sought in the application was for determination of the standard rent of the premises at Shs. 250/- per month under s. 4 (1) (a) of the Rent Restriction Act. The Board should have held that in view of the contention by the applicant throughout the proceedings that the rent of the premises as on July 1, 1959, was Shs. 250/- per month and in the absence of any claim for relief under s. 4 (2), it would be unfair, unjust and against the rules of natural justice to determine the application under s. 4 (2) of the Act particularly as the Board found that the rent of the premises on July 1, 1959, was Shs. 180/- per month.”

In arguing this ground of appeal, Mr. Kanji, who appeared for the appellant, submitted that the appellant “did not get an adequate opportunity to meet the case”. He said, and I quote:

“The application was for determination of the standard rent, according to my submission, under s. 4 (1) (a) of the Rent Restriction Act. This, I say, because of the facts which have been put forward under para. 10 of the application.”

Paragraph 10 of the application reads:

“The building was completed in January, 1959, and exempted from the provisions of Rent Restriction Ordinance, 1955. The flat was rented to the respondent with effect from 24.1.59, at a monthly rent of Shs. 250/-, being as to Shs. 180/- to be paid by the respondent and as to balance of Shs. 70/- to be credited to his account, out of the sum of Shs. 2,000/- deposited with the landlord on behalf of the respondent by one R. S. Sohota. The rent on the prescribed date was Shs. 250/- as mentioned above. The rent was decreased to Shs. 245/- per month as from 1.2.61, payable in advance, and which the respondent used to pay until August 20, 1962.”

In his written statement of defence the appellant denied that the rent was Shs. 250/- per month and asserted that it was Shs. 180/- per month. The parties are thus disputing what the rent was at the commencement of the tenancy and at the prescribed date, which is the material date, and both parties in their pleadings pray the Board to determine the standard rent. I am therefore unable to understand learned counsel’s complaint that:

“If the applicant intended to rely on the provisions of s. 4 (2) (b) or 2 (a), in my submission he ought to have pleaded facts, which would enable the Rent Board to consider the matter on that basis and thereby would also give notice to the respondent, the present appellant, on what he had to meet at the hearing.”

I fail to see how else the respondent could have pleaded or set out the facts, and it is trite law that a party does not need to plead law, but only the facts. As for the submission that the application was brought under s. 4 (1) of the Act, there is no mention of or reference in the pleadings to either one sub-section or the other. Nor, in his opening address to which Mr. Kanji referred, did Mr. Dave, for the respondent, refer to any section, let alone to a specific clause of a sub-section. Because learned counsel assumed, as apparently he did, that the application was brought under s. 4 (1), it does not follow that the Board laboured under such an assumption. There is nothing in the record to suggest, nor has Mr. Kanji suggested, that the Board expressed or indicated its mind to such effect so as to mislead the parties, or one of them. The duty of a tribunal is to find on the facts in accordance with the evidence adduced before it and then apply the appropriate law to such finding. A court or tribunal can, and often does draw attention to some specific law or provision and ask to hear learned

counsel on it in relation to some issue or point before it. But failure to do so would not in general preclude it from applying the said law or provision and particularly so when the provision is in the very Act, in fact, the very section of the Act, which must of necessity apply to the proceedings. It is not as if the Board unexpectedly produced some obscure or remote law from its sleeve. I fail to see how the appellant could possibly have been prejudiced in the presentation of his evidence as to the facts. The factual issue was, what was the rent at the prescribed date? The appellant called all the evidence he could in support of his contention that it was Shs. 180/- per month. How can he then be said to have been prejudiced because the Board made their determination under sub-s. (2) of s. 4 instead of sub-s. (1) of the section? It is also very pertinent to note that both learned counsel in their closing addresses expressly referred to sub-s. (2).

I am perfectly satisfied that the complaint that it was “unfair, unjust and against the rules of natural justice” for the Board to make its determination under sub-s. (2) of s. 4 is without any substance. As for the statement that the Board found that the rent of the premises on July 1, 1959, was Shs. 180/- per month, this is not correct. The Board found that the rent was Shs. 180/- plus. I will deal with this aspect when considering the next, the second ground of appeal, which is:

“The Board erred in holding, as it did, that the rent of Shs. 180/- per month was not a proper and genuine rent and should have held that the premises were let at the prescribed date for Shs. 180/- rent per month which was the rent freely agreed between the parties and it could not fall under the category of nominal, fictitious or collusive rent or of the ‘same nature’.”

This issue must be dealt with both on the factual and the legal aspect. With regard to the first, it could be argued, as was raised by Mr. Rattansey who appeared for the respondent, that this is a finding of fact and therefore not appealable by s. 11 (1) of the Act, which reads:

“Except as hereinafter provided, where any question is, under the provisions of this Act, to be decided or determined by a Board, the decision or determination by such Board shall be final and conclusive: Provided that an appeal from any order, decision or determination of a Board shall lie to the High Court upon any point of law or of mixed fact and law.”

However, Mr. Rattansey did not press such submission, and according to Mr. Kanji, even on the facts as found by the Board the Board had no right in law to determine as it did. The matter is therefore one of mixed fact and law.

To deal with the factual aspect first, it is common ground that the building was completed on January 8, 1959, and that the appellant went into occupation of his flat on January 24, 1959, paying rent as from February 1. Therefore by s. 4 (1) (a) of the Act the standard rent of such flat is “a rent determined by a Board to be the rent at which the premises were let at the prescribed date”. The prescribed date is defined in s. 2 (1) as meaning July 1, 1959. It was therefore necessary for the Board to determine what the rent was on July 1, 1959. On this the Board found:

“This Shs. 2,000/- payment is put forward by the applicant as merely being a deposit made by a third party in respect of part of the rent of the flat, i.e. Shs. 70/- per month for 24 months. On the other hand the respondent claims that it was simply ‘pugree’ – a premium, ‘key money’ – and we are inclined to accept this . . . We have no doubt that a pecuniary consideration was received as a condition of the letting. It was in respect of premises which were never subject to rent restriction but the payment was

in fact made prior to the decontrol and it seems to us that it may well have been illegal at the time. However, it also looks as if it affected the rent actually paid. From the evidence we have heard it is clear that similar flats in the same building were originally let at not less than Shs. 225/- per month; the most similar flat bore a rent of Shs. 235/- per month and does not have quite the same advantages as the respondent's flat. If we compare these various flats we would expect the respondent to have had to pay Shs. 245/- per month . . .

"In the circumstances we find ourselves unable to accept that the rent of Shs. 180/- per month was a proper or genuine rent. If it does not come within the phrase 'nominal, fictitious or collusive' in s. 4 (2) (b) of the Act then it is of the same nature. We are satisfied that special circumstances exist whereby we should disregard it and assess the rent at a reasonable figure. In our view the only way to do this is to compare this flat with its neighbours and we have already indicated that a figure of Shs. 245/- per month appears to be justified here. We propose to assess the standard rent accordingly."

And the Board did so.

Mr. Kanji submits that firstly, the Board having found that the Shs. 2,000/- was a premium it should have held that the rent was not affected by this payment and was therefore Shs. 180/- per month only; and secondly, having found that the payment was in fact a premium the Board could not relate it to the rent.

Rent is defined in s. 2 of the Act as:

" 'rent' includes any sum paid as valuable consideration for the occupation of any premises and any sum paid as rent or hire for the use of furniture" etc.

The Act however, does not define what is a premium. In *King v. Earl of Cadogan* (1), [1915] 3 K.B. 485 at p. 492, Warrington, L.J., defined:

" . . . 'premium', as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is a very familiar expression to everybody who knows the forms and powers of granting leases. It is in fact the purchase-money which the tenant pays for the benefit which he gets under the lease."

Although it may be a payment for the benefit of a lease, a premium is not in fact part of the rent but is a payment extraneous to the rent. This is also clear from the Act itself, the relevant part of s. 21 (1) of which reads:

"No person shall as condition express or implied of the grant, assignment, renewal or continuance of a tenancy, lease, sub-lease, sub-letting or occupation of any premises, require the payment of or take or give any fine, premium or other like sum, or any pecuniary consideration, in addition to the rent."

If the Board had, as submitted by Mr. Kanji, found as a fact that the Shs. 2,000/- was a premium, it would be a contradiction in terms to go on to find that it represented a part payment of rent in advance. The Board, however, did not find that the Shs. 2,000/- was a premium simpliciter. It said in the passage above quoted:

"On the other hand the respondent claims that it was simply 'pugree' – a premium, 'key money' – and we are inclined to accept this."

And further on, it said:

“However, it also looks as if it affected the rent actually paid.”

To my mind, the Board in effect found the Shs. 2,000/- to be part premium and part advance payment of rent. Although the terms “rent” and “premium” are mutually exclusive, there is nothing to prevent a payment being in part the one and in part the other, and this is what the Board found.

This finding of the Board that the payment of Shs. 2,000/-, to borrow its expression, “affected the rent”, is to my mind amply supported and justified by the facts. No objection has been taken to the finding of the Board that in relation to the other flats in the same building and to what the tenants of such flats were in fact paying, the proper and reasonable rent should be Shs. 245/- per month. The question immediately poses itself, why should or did the respondent let the appellant have the flat at the low figure of Shs. 180/- per month? This was put to the appellant in cross-examination and he said, “I cannot say why landlord should charge me less than other tenants”. The appellant further stated that the other tenants, who were paying higher rents, had not paid or given any premium. It is therefore to my mind, clear that the reason the landlord accepted this lower figure of Shs. 180/- per month from the appellant was because of this payment of Shs. 2,000/-; that is such payment affected the monthly payment of Shs. 180/-. In other words, the Shs. 180/- per month was only part of the rent, the whole rent being Shs. 180/- plus, which is what the Board found.

The only point that occasioned me any difficulty was, that as the tenancies of the adjoining and neighbouring flats in the same building did not apparently commence until after January 1, when by Government Notice No. 11 of 1959, such premises were decontrolled, it would not be fair to compare their rents with that of the appellant’s flat. Although the appellant did not occupy the flat until after January 1, 1959, the arrangement and agreement for the tenancy were made in the preceding December, when such premises were still subject to the control of the then Rent Restriction Ordinance, since repealed. However, the Government Notice referred to, decontrolling such premises, is dated December 22, 1958. The notice had been preceded by advance publicity. There is nothing on the record to indicate that the respondent landlord was not aware of the impending decontrol. As for the appellant, he is recorded as saying in cross-examination, “I never knew decontrol of premises was coming. I do read papers. I heard something. I did not read Government Notice No. 11 of 1959”. However, if the Shs. 180/- per month was not due to or affected by the previous payment of Shs. 2,000/-, why then, on the decontrol of such premises as from January 1, 1959, did not the landlord increase this figure of Shs. 180/-? As the appellant himself stated, “He could have increased rent on me or asked me to vacate”. Yet the respondent landlord did not increase the rent then but waited for two years before he did so. It is thus abundantly clear that the payment of the Shs. 2,000/- was in fact reflected in the figure of Shs. 180/- per month.

Mr. Kanji submits, however, that it was not open to the Board in law to find any other figure for the standard rent than the figure actually paid as rent, in this case Shs. 180/-, on the prescribed date, unless the Board found such payment to be nominal, fictitious, or collusive, as provided for in the Act. The relevant parts of sub-s. (2) of s. 4 of the Act read:

“(2) Notwithstanding anything contained in the foregoing provisions of this section –

- (a) in the case of any premises in regard to which a Board is satisfied that in the special circumstances of the case it would be fair and reasonable to alter whether by way of increase or reduction the

amount of the standard rent as ascertained in accordance with sub-s. (1), the Board may assess the standard rent of such premises at such figure as the Board shall in all the circumstances of the case consider reasonable;

- (b) in the case of any premises in regard to which a Board is satisfied that it is not reasonably practicable to obtain sufficient evidence to ascertain the rent at which such premises were let at the prescribed date, or that the rent at the prescribed date was a nominal, fictitious or collusive rent, the Board shall have power to determine the rent at the prescribed date as being of such amount as the Board thinks proper having regard to the rents at which premises of a similar character in the neighbourhood were let at the prescribed date.”

On this aspect it is by no means clear what the Board actually decided in law as to which clause of sub-s. (2) it applied, (a) or (b), the language used by the Board being most equivocal. The Board stated (in the passage above quoted):

“In the circumstances we find ourselves unable to accept that the rent of Shs. 180/- per month was a proper or genuine rent. If it does not come within the phrase ‘nominal, fictitious or collusive’ in s. 4 (2) (b) of the Act then it is of the same nature. We are satisfied that special circumstances exist whereby we should disregard it and assess the rent at a reasonable figure. In our view the only way to do this is to compare this flat with its neighbours and we have already indicated that a figure of Shs. 245/- per month appears to be justified here. We propose to assess the standard rent accordingly.”

The Board has thus employed the language of both clauses. Although the Board has used the expression “special circumstances”, it is clear that it did not make its finding under cl. (a). In fact, it could not do so in law. Under cl. (a) the Board must first find what the standard rent would be if ascertained in accordance with sub-s. (1) of the Act. Then, and then only, if the Board is satisfied that in special circumstances-incidentally, special to the premises and not to the parties-it would be fair and reasonable to alter such standard rent either by way of increase or decrease, it may assess the standard rent of such premises at a figure the Board considers reasonable. But it must first ascertain the standard rent in accordance with sub-s. (1). Here the Board was engaged in ascertaining the standard rent. Before arriving at the figure of Shs. 245/- per month the Board had not ascertained any other standard rent. The finding of the Board, as indeed agreed by both parties, must come under cl. (b). In this connection it is conceded that a figure of Shs. 180/- per month as rent for the flat, cannot be regarded as either nominal or fictitious. Mr. Kanji submits that it cannot be regarded as collusive either and he has referred to the definition of “collusive” in Stroud’s Judicial Dictionary. Various definitions of “collusive” and “collusion” in different and varied contexts are there set out, most of them containing an element of mala fides. However, some definitions contain no such element. They are – I am quoting from the (3rd Edn.), Vol. 1 at p. 519:

“ ‘Collusion’ only signifies agreeing together (per Bramwell, B., *Gill v. Continental Gas Co.*, L.R. 7 Ex. 337). So, of s.1, c. 51, Consolidated Statutes of British Columbia, which nullifies judgments, etc., of insolvents obtained by ‘collusion’, which means, ‘by agreement, or acting in concert’ (*Edison Co. v. Westminster, etc., Tramway Co.*, [1897] A.C. 193; approving *Martin v. McAlpine*, 8 Ontario App. 675). So, as regards interpleader, Rules of the Supreme Court, O. 57, r. 2 (b), ‘collusion’ does not connote anything morally wrong; the applicant must not be ‘playing the same game’



as either of the claimants; that is the literal meaning of ‘colluding’ (per Wills, J., *Murietta v. South American Co.*, 62 L.J. Q.B. 396; see also *Wood v. Wood*, L.R. 9 Ex. 190; see Annual Practice).”

A collusive rent is thus capable of meaning a rent agreed between the landlord and tenant, which for some reason or other, neither dishonest nor tainted with mala fides, is peculiar to the parties as distinct from the premises, and it can also mean that such rent has an element of dishonesty or mala fides. Although the narrower meaning of collusive is the more popular, the wider meaning is not obsolete. If the context in which the word appears requires or justifies such wider meaning, such meaning should and must be applied. As stated by the Court of Appeal for Eastern Africa in *Juma Shabani Keshallilla v. R.* (2), [1963] E.A. 184 (C.A.), in construing the word “alter” in s. 319 of the Tanganyika Criminal Procedure Code:

“The meaning of ‘alter’ is given in the same dictionary (the Shorter Oxford Dictionary) as ‘to make different in some respect without changing the thing itself’. That is the meaning contended for by counsel for the appellant, but in our view the word can have a wider meaning if required or justified by the context. It is used earlier in the section in the phrase ‘alter the finding’ and in that context it has been held to mean that the finding can be altered to any other finding that the court considers proper on the findings of fact at which it arrives in appeal. The authority is *Zamir Qasim v. R.* (1944), A.I.R. All. 137 at p. 142. The usual alteration of a finding as exemplified in that case is the substitution of a conviction of one offence for that of another. That appears to involve a complete substitution and goes further than a mere change of form. We think that, on a similar approach, it is quite unnecessary to regard a power to alter an order made under s. 305 (1) of the Code as being restricted to alterations, for example, in the amount or term of the bond. In the context of the section, having regard to its wide scope and plain object, in our opinion the word is to be construed as embracing the substitution of another order, in the same way as the power to alter a finding gives power to substitute a different conviction.”

It is therefore necessary to consider the context in which the expression “collusive” appears, which naturally includes a consideration of the object of the provision in particular and of the Act itself in general, i.e. the evil or mischief it is intended to remedy. The object of the legislation is to prevent the exploitation of tenants by landlords taking advantage of the scarcity of residential accommodation in relation to the demand. At the same time it aims at giving landlords a fair and economic return on their capital, otherwise the source would dry up, making the scarcity still more acute, which would defeat the whole object of the Act. Parliament has laid down provisions as to how this fair and economic return – the standard rent – is to be ascertained and determined. Thus, for premises erected or substantially reconstructed and let after the prescribed date (July 1, 1959), the rent is based on the marked cost of such erection or reconstruction to yield a return not exceeding 14% of such cost, etc. In the class of premises to which the flat in this case belongs, the Act has adopted the rent at the prescribed date to be the standard rent. However, not every or any rent paid at the prescribed date is to be adopted. If the rent is a nominal, fictitious or collusive one, it is to be disregarded and

“the Board shall have power to determine the rent at the prescribed date as being of such amount as the Board thinks proper having regard to the rents at which premises of a similar character in the neighbourhood were let at the prescribed date”.



Whilst it is not difficult to associate a fictitious rent with some dishonest object, there is no reason to associate a nominal rent with any such object. Likewise, although a collusive rent can well be tainted with dishonesty or mala fides, even in the absence of any dishonesty or mala fides, there is no reason for adopting such rent as the standard rent, if it is not a proper or economic rent in relation to the premises. The standard rent of premises is a determination in rem. If at some period in the history of premises the landlord and tenant have, because of some particular relationship between them or for some other reason, agreed between themselves a particular figure, whether higher or lower than a fair economic rent in relation to the premises, there is no reason at all why, if such premises change hands, any other landlord or tenant should be bound by such figure as rent; for example, if the landlord at the prescribed date, whether moved by general benevolence or a particular sentiment towards the tenant, contented himself with a most uneconomic rent, which need neither be nominal nor fictitious, is that a valid reason why any future landlord should be precluded from charging a fair economic rent? Likewise if for some reason particular to the parties, a tenant at the prescribed date paid a rent greatly in excess of the economic rent, not necessarily a fictitious rent, is that a reason why future tenants should be bound to pay such rent? To my mind, the legislature, in laying down that the rent at the prescribed date should be adopted as the standard rent, intended that such rent should be adopted only if it was a fair economic rent in relation to the premises, but not if it was a rent peculiar to the parties, whether it was nominal, fictitious, or collusive – in its literal and wider sense, that is, a figure agreed between and peculiar to, the parties, but not related to the premises as such. Although the criterion is not what the legislature intended but the intention is, I consider, realised in the provisions of the clause without entailing any strain on the language.

The Board having found that the figure of Shs. 180/- paid as rent on the prescribed date was not the genuine economic rent, very properly ascertained the standard rent from the rents of the adjoining and neighbouring premises as provided for in the Act. This determination of the Board can therefore be supported on the ground that the Shs. 180/- paid at the prescribed date was a collusive rent within the meaning of s. 4 (2) (b). On the other hand, the determination can equally well be supported on the ground that having found that the true economic rent at the prescribed date was Shs. 180/- plus, and having rejected the respondent landlord's contention that the plus was in fact Shs. 70/-, but being unable to translate the plus into shillings, the Board ascertained the rent in the same manner as also provided for in the same s. 4 (2) (b):

“in the case of any premises in regard to which the Board is satisfied that it is not reasonably practicable to obtain sufficient evidence to ascertain the rent at which such premises were let at the prescribed date.”

In arguing this ground of appeal, Mr. Kanji cited English cases in support of his contention that whatever rent was paid at the prescribed date, however uneconomic or however much affected by the particular relationship between the then landlord and tenant, such rent must be adopted as the standard rent. Such cases, however, have no relevance here. There is no provision in the English Acts corresponding to the provision in our Act that if the rent at the prescribed date was nominal, fictitious or collusive, it is to be disregarded in determining the standard rent.

The second ground of appeal therefore fails.

The third ground of appeal is that:

“The Board having held that if it were merely fixing a rent as between the applicant and respondent it might be disposed to leave the applicant in the position she got herself into in 1959 erred in not directing itself to the

provisions in the Act which would enable it to increase the amount of the standard rent from Shs. 180/- per month to any other figure, if the respondent ceased to be the tenant of the premises.”

On this aspect the Board stated and directed itself:

“We would add that if we were merely fixing a rent as between the applicant and the respondent we might be disposed to leave the applicant in the position she got herself into in 1959. But it is our duty to fix a rent for this flat – to fix it in rem and not in personam – whoever the landlord or tenant may be.”

With respect, I fully agree with the Board that a determination of a standard rent is a finding in rem and it was not open to the Board to vary the standard rent on account of the personalities or the particular relationship between the landlord and the tenant. This ground also fails.

The fourth ground of appeal is that:

“The Board did not direct itself adequately to the question that the applicant had received illegally the sum Shs. 2,000/- from the former landlord of the respondent a premium in 1958. In view of the illegal nature of the transaction as regards the sum Shs. 2,000/- the Board should have ignored the same and in that event held that the premises were let on the prescribed date at the proper and genuine rent of Shs. 180/- per month.”

In this connection the Board stated:

“But it is submitted on behalf of the respondent that the applicant cannot now complain about a rent of Shs. 180/- per month upon the basis that it was affected by the receiving of an alleged payment. We appreciate this argument but we are bound to find that the respondent is tainted by the same illegality and is in no position to complain either. He not only knew of the payment being made but accompanied the payer when it was made. He knew the purpose of it and must be treated as if he were party to the transaction.”

It is perhaps arguable whether the payment was in fact illegal. At the time it was made dwelling-houses were controlled, but the tenancy did not take effect until after January 1, 1959. By Government Notice No. 11 of 1959, all premises the erection or substantial reconstruction of which were completed after the first day of December, 1958, were decontrolled. These instant premises were completed after such date; therefore a premium at such date would not be an illegal payment. However, even assuming that the payment was illegal, the Board’s finding that the appellant was also tainted with the illegality is supported and justified by the evidence. He is not therefore in a position to complain. Apart from that, as indicated in dealing with the previous grounds of appeal, the determination of the standard rent is a finding in rem and cannot be affected by such extraneous personal considerations. This ground of appeal thus also fails.

The fifth and last ground of appeal is that:

“The Board should have held that there were no special circumstances within the meaning of s. 4 (2) entitling it to disregard its finding that the rent was Shs. 180/-, alternatively if there were such circumstances it was not fair and reasonable to increase the standard rent as ascertained, and the Board wrongly exercised its discretion.”

As already indicated in considering the other grounds of appeal, despite the language of the Board the determination was not made under cl. (a) but under

cl. (b). Therefore, as Mr. Kanji himself stated in arguing this ground, it has no relevance if the determination was under cl. (b).

The appeal is accordingly dismissed with costs to the respondent.

*Appeal dismissed.*

For the appellant:

*SH Kanji*

*Fraser Murray Thornton & Co, Dar-es-Salaam*

For the respondent:

*MN Rattansey*

*Mahmud N Rattansey & Co, Dar-es-Salaam*

## **The Commissioner of Income Tax v CW Armstrong** **[1963] 1 EA 505 (CAN)**

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|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Nairobi                            |
| <b>Date of judgment:</b> | 20 August 1963  |
| <b>Case Number:</b>      | 48/1962   |
| <b>Before:</b>           | Sir Trevor Gould Ag P, Crawshaw Ag V-P and Newbold JA |
| <b>Sourced by:</b>       | LawAfrica   |
| <b>Appeal from:</b>      | H.M. Supreme Court of Kenya – Mayers, J               |

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[1] *Income tax – Direction by Commissioner – Direction that certain income be that of taxpayer – Direction to be in Commissioner’s opinion just and reasonable – Whether direction should so state – East African Income Tax (Management) Acts, 1952 and 1958, s. 23.*

[2] *Income tax – Direction by Commissioner – Appeal – Onus of proof that direction invalid – East African Income Tax (Management) Act, 1958, s. 115 (1).*

[3] *Income tax – Direction by Commissioner – Appeal – Evidence – No evidence that Commissioner had considered whether direction just and reasonable – Whether court may presume direction given regularly – Indian Evidence Act, 1872, s. 114.*

[4] *Income tax – Direction by Commissioner – Appeal – Purpose of transaction avoidance or reduction of tax liability – Whether taxpayer has right of appeal on question of fact – East African Income Tax (Management) Act, 1958, s. 113 (h), s. 115 (1) (b).*

[5] *Income tax – Direction by Commissioner – Direction that certain income be that of taxpayer – Purpose of transaction avoidance or reduction of tax liability – Whether direction can be made only*

*respecting artificial or fictitious transactions – East African Income Tax (Management) Act, 1958, s. 23.*

*[6] Income tax – Direction by Commissioner – Direction aimed at two distinct transactions – Whether direction stands or falls as a whole – Whether direction bad in law if one transaction not for avoidance of tax – East African Income Tax (Management) Act, 1958, s. 23.*

### **Editor's Summary**

On September 28, 1954, the coffee-growing business of the respondent and his brother, who was resident in the United Kingdom, was incorporated under the name Ibonia Estates Ltd. (hereinafter called "Ibonia") and the shares thereof which ranked *pari passu* for dividends, were divided between the brothers as to one-third to the respondent and two-thirds to his brother. On instructions of the respondent all but one of his shares were allotted by Ibonia to Kwetu Farm Ltd. (hereinafter called "Kwetu"). An entry was made in

Kwetu's books crediting the respondent with the nominal value of the shares. Kwetu was also a farming business and since March, 1951, the respondent had in effect been the sole shareholder. On March 28, 1958, a resolution was passed at an extraordinary general meeting of Ibonia dividing its issued shares into "A" shares (held by the respondent's brother) and "B" shares (held by Kwetu), and providing that the "A" and "B" shares should no longer rank *pari passu* as to dividend, but that each class of share should, if the company in general meeting so determined, be entitled to dividends without reference to the dividends, if any, on the other. Later on the same day a dividend of £12,784 gross was declared on the "B" shares. The tax deducted at source, amounting to £3,196, was later claimed and repaid to Kwetu. No dividend was declared on the "A" shares but the respondent's brother at that time owed Ibonia a considerable sum and the dividend declared on the "B" shares had regard to this debt. Further dividends were declared by Ibonia in 1958 and 1959 and claims for repayment of tax deducted at source in respect of those dividends were made by Kwetu. On February 2, 1961, the appellant made a direction in which, after referring to the allocation of Ibonia shares on September 28, 1954, to Kwetu on the instructions of the respondent, and to the division of the shares on March 28, 1958, into "A" and "B" ordinary shares, he directed that, under s. 23 of the East African Income Tax (Management) Acts, 1952 and 1958, any dividends declared by Ibonia in respect of its shares registered in the name of Kwetu, should be deemed for income tax purposes to be income of the respondent, on the ground that there was reason to believe that the main purpose or one of the main purposes of the transactions was avoidance or reduction of liability to tax. The respondent appealed to the Supreme Court against this direction on the grounds, *inter alia*, that the direction was defective in law in that it showed that the appellant had failed to consider whether the adjustments directed were "just and reasonable" within the meaning of s. 23 of the 1958 Act, that the two transactions were not inter-related in point of time or purpose, that the avoidance or reduction of liability to tax was not the main purpose or one of the main purposes of the transactions or either of them, and that the transaction of September 28, 1954, fell within proviso (b) (iii) to s. 23 (1) of the 1958 Act. On the evidence of the respondent and his accountant, the trial judge held that (a) one of the respondent's main purposes in directing Ibonia to allot shares to Kwetu was avoidance or reduction of liability to tax, (b) in dividing its shares into two categories, Ibonia did not have as one of its main purposes, or as one of its purposes at all, the ensuring of tax advantage in relation to Kenya income tax and (c) since the direction under s. 23 did not recite that the appellant had considered the justness and reasonableness of the direction, nor was there any evidence aliunde to that effect, the direction was *ultra vires*. Both parties appealed. The appellant appealed on the ground that the trial judge erred in law in holding that a direction had to recite that the appellant had considered whether it was just and reasonable to make it. In his cross-appeal, the respondent contended that the judgment of the Supreme Court ought to be affirmed upon the grounds that the trial judge had erred in holding (a) that on the facts the appellant had reasonable grounds to believe that avoidance or reduction of liability to tax was one of the purposes of the transactions, (b) that the appellant had reasonable cause to believe that one of the main purposes of the division of the share capital of Ibonia was the possibility of a tax advantage and (c) that one of the main purposes of the allotment of shares in Ibonia to Kwetu was the avoidance or reduction of liability to tax and (d) that the direction was bad in law in view of the finding that there was no manifest connection between the first and second transactions. The appellant also submitted that the first three grounds of the cross-appeal could not be raised as they were questions of fact.

**Held –**

- (i) in order to determine the questions raised on the appeal and cross-appeal it was necessary to ascertain where the ultimate onus lay if a direction under s. 23 was challenged.
- (ii) in view of the latter part of s. 115 (1) of the 1958 Act, it was clear that the onus was on the respondent to prove all facts necessary to sustain his submission that the direction was invalid whether for one reason or another; therefore,
- (iii) the decision of the judge that the direction was bad, whether as a matter of form or because there was no evidence from the appellant to show that the direction was just and reasonable, was incorrect.
- (iv) in any event, by virtue of s. 114 of the Indian Evidence Act, 1872, the court would presume that the act of making the direction was performed regularly, that is, that the appellant had considered that the adjustments which he directed to be made were both just and reasonable as well as appropriate in the absence of any evidence that he had failed to consider such matters.
- (v) s. 115 (1) (b) of the Act by specifically allowing an appeal on the ground that the avoidance or reduction of liability to tax was not the main purpose, or one of the main purposes, of the transaction, had given to the respondent a right of appeal on a question of fact in so far as a determination of the main purpose, or one of the main purposes, of the transaction was concerned; consequently, s. 113 (h) had no application to an appeal against a direction given under s. 23 in so far as the appeal raised any question of fact alone which could be brought within the grounds on which an appeal was permitted under s. 115 (1) (b).
- (vi) the proposition that s. 23 applied only in respect of artificial or fictitious transactions was not correct; nor that it only applied if the transaction was incapable of explanation by reference to normal factors and if the avoidance or reduction of liability to tax was the only purpose.
- (vii) there was no reason for differing from the judge's finding that the main purpose, or one of the main purposes, of the allotment of shares to Kwetu was the avoidance or reduction of liability to tax.
- (viii) as the direction sought to restore to the respondent income which would have been his but for these transactions, the court was satisfied that the adjustments directed to be made were both just and reasonable and appropriate.
- (ix) a direction must stand or fall as a whole and since the judge had found that the second transaction relating to the division of shares was neither entered into for purposes of avoidance nor was connected with the first from which there had been no appeal, the direction must be held to be bad, even if the appeal succeeded.

**Obiter:** The trial judge had erred in his conclusion that the main purpose, or one of the main purposes, of the second transaction referred to in the direction was not avoidance or reduction of liability to tax and that there was no manifest connection between the first and second transactions.

Appeal and cross-appeal allowed. Decree of the Supreme Court of Kenya affirmed.

**Cases referred to in judgment:**

- (1) *Associated Contractors Ltd. v. The Commissioner of Income Tax (Case No. 62)*, 3 E.A.T.C. 10.
- (2) *Edwards (Inspector of Taxes) v. Bairstow and Harrison*, 36 T.C. 207; [1955] 3 All E.R. 48.
- (3) *Newton v. Commissioner of Taxation, Australia*, [1958] A.C. 450; [1958] 2 All E.R. 759.

(4) *R. v. Comptroller-General of Patents, Ex parte Bayer Products, Ltd.*, [1941] 2 K.B. 306; [1941] 2 All E.R. 677.

August 20. The following judgments were read:

### Judgment

**Newbold JA:** This appeal and cross-appeal relate to the validity of a direction given on February 2, 1961, by the Commissioner of Income Tax (the appellant in the appeal and hereinafter referred to as “the Commissioner”) under s. 23 of the East African Income Tax (Management) Act, 1958 (hereinafter referred to as “the Act”) in respect of two specified transactions whereby certain dividends were deemed for income tax purposes to be the income of the respondent (hereinafter referred to as “the taxpayer”). The direction in question purported to have been made under both s. 23 of the Act and s. 23 of the East African Income Tax (Management) Act, 1952, which had been repealed with effect from January 1, 1958, by the Act. The learned judge from whom this appeal is brought held that the direction in so far as it purported to have been made under s. 23 of the 1952 Act was bad, and there has been no appeal from that decision. It is not in dispute that the dividends to which the direction relates would, if the direction is valid, be income of the taxpayer for the year of income, 1958, and thus income to which a direction under s. 23 of the Act could apply, notwithstanding that the transactions which gave rise to the income took place before 1958. The learned judge held that the direction was bad as it did not recite one of the ingredients which he regarded as necessary to the giving of a direction under s. 23, and from that decision the Commissioner has appealed on the ground that the judge erred in law in so holding. The taxpayer has cross-appealed asking that the decision of the judge should be upheld for reasons other than those relied upon by him.

The facts relevant to this appeal and cross-appeal may be shortly stated as follows. Prior to September 28, 1954, the taxpayer and his brother, who was resident in the United Kingdom, carried on the business of coffee farming in partnership. On that date the business, which was a very profitable one, was incorporated under the name of Ibonia Estates Limited (hereinafter referred to as “Ibonia”) and the shares therein, which ranked *pari passu* for dividends, were divided between the two former partners in the proportion of one-third to the taxpayer and two-thirds to his brother. On the instructions of the taxpayer all but one of the shares which would otherwise have been allotted to him by Ibonia were allotted to Kwetu Farm Limited (hereinafter referred to as “Kwetu”) and a book entry was made in Kwetu’s books crediting the taxpayer with the nominal value of the shares. Kwetu also carried on the business of farming and since March, 1951, the taxpayer had in effect been the sole shareholder. Considerable money had been, and continued to be, necessary for the development of Kwetu and although the company had made a relatively small profit in the years 1950, 1952 and 1953, at the end of the year 1953 the company had an accumulated tax loss of £2,767. In the years 1954, 1955, 1956 and 1957, losses were made by Kwetu which resulted in it having an accumulated tax loss at the end of the year 1957 of £14,862. On March 28, 1958, Ibonia declared on the “B” shares only as hereinafter mentioned a gross dividend of £12,784, which fell within the year of income, 1957, for the purposes of Kwetu, and this had the result of reducing the accumulated loss of Kwetu to £2,078. In 1958 Kwetu made another substantial loss of £10,809, with the result that its accumulated losses up to the end of the year 1958 amounted to £12,887. In 1958 Ibonia (together with other companies) declared a further gross dividend of £11,121 which had the result of reducing the accumulated loss of Kwetu to £1,766.



In 1959 Kwetu again made a loss of £5,557, with the result that its accumulated loss up to the end of the year 1959 was £7,323. In that year Ibonia (together with other companies) declared a further gross dividend of £2,430, with the result that for its year of income, 1960, Kwetu started with an accumulated loss of £4,893 in spite of having received in respect of its years of income 1957, 1958 and 1959 gross dividends of £26,335. Tax on such dividends had, of course, been deducted at source and paid by Ibonia and the amount of such tax would be in the neighbourhood of £6,600.

On March 28, 1958, a resolution was passed at an Extraordinary General Meeting of Ibonia dividing its previously issued shares into "A" shares (which were the shares held by the taxpayer's brother) and "B" shares (which were the shares held by Kwetu), and providing that the "A" and "B" shares should no longer rank *pari passu* as to dividend, but that each class of share should, if the company in general meeting so determined, be entitled to dividends without reference to the dividends, if any, on the other. Later on the same day a dividend of £12,784 gross (£9,588 net) was declared on the "B" shares and the tax deducted at source, amounting to £3,196, was later claimed and repaid to Kwetu. No dividends were declared on the "A" shares but the taxpayer's brother at that time owed Ibonia a considerable sum and the amount of the dividend declared on the "B" shares had regard to this debt. As already stated, further dividends were declared in 1958 and 1959 and claims for the repayment of the tax deducted at source in respect of those dividends were made by Kwetu.

On February 2, 1961, the Commissioner made a direction in the following terms:

"Having reasonable grounds to believe that the main purpose, or one of the main purposes, of the transactions whereby:

- (a) on or about September 28, 1954, 1,087 shares of Shs. 20/- each in Ibonia Estates Limited were allocated on the instructions of C. W. Armstrong to Kwetu Farm Limited; and
- (b) on March 28, 1958, the ordinary shares of Ibonia Estates Limited were divided into 'A' ordinary shares and 'B' ordinary shares

was the avoidance or reduction of liability to tax, I hereby direct under the provisions of ss. 23 of the E.A. Income Tax (Management) Acts, 1952 and 1958, that, so as to counteract the avoidance or reduction of liability to tax which would otherwise be effected by the said transactions, any dividends declared by Ibonia Estates Limited in respect of the shares in that company registered in the name of Kwetu Farm Limited, shall be deemed for income tax purposes to be income of C. W. Armstrong."

The taxpayer appealed against this direction to the Supreme Court on grounds which may be summarised as follows:

1. The direction was defective in law in that it shows that the Commissioner failed to address himself to the question of whether the adjustments directed were "just and reasonable" within the meaning of s. 23 of the Act.
2. The transactions which were the subject matter of the direction were not inter-related in point of time or purpose.
3. The avoidance or reduction of liability to tax was not the main purpose or one of the main purposes of the transactions or either of them.
4. No direction ought to have been given.
5. The adjustments directed to be made were inappropriate.
6. The adjustments directed to be made were neither just nor reasonable.
7. The transaction of September 28, 1954, fell within proviso (b) (iii) to s. 23 (1) of the Act.

In accordance with the procedure relating to income tax appeals the taxpayer and the Commissioner each filed a statement of facts. The matter then came before the Supreme Court and argument was heard on the preliminary point of where lay the onus of proof. The learned judge delivering a ruling that the onus lay first on the Commissioner to establish *prima facie* that he had reasonable grounds to believe that the main purpose, or one of the main purposes, of the transactions referred to in the direction was the avoidance or reduction of liability to tax (the whole of which phrase I shall compendiously refer to hereafter as avoidance purposes) and that, if the Commissioner discharged that onus, then it would be for the taxpayer to show either that in fact there were no reasonable grounds for that belief, or, possibly, if there were such reasonable grounds, the belief was in fact wrong. From that ruling there has been no appeal. Following that ruling the Commissioner led no evidence but relied upon the facts set out in the statement of facts filed by the taxpayer to discharge the onus placed on him. Apparently the learned judge held that the Commissioner had discharged this onus and thereafter the taxpayer and his accountant gave evidence. On the evidence given by the taxpayer the learned judge held that one of the taxpayer's main purposes in directing Ibonia to allot shares to Kwetu rather than to himself was to gain, in the event of Kwetu making a loss, the tax advantage of a refund of the tax paid by Ibonia on any dividend distributed, and thus was the avoidance or reduction of liability to tax on the part of the taxpayer. On the evidence of the taxpayer and his accountant, the learned judge held that the evidence did not establish on the balance of probability that Ibonia, in resolving to divide its shares into two categories, had as one of its main purposes, or as one of its purposes at all, the ensuring of tax advantage in relation to Kenya income tax. There has been no appeal against this second holding of the learned judge. The learned judge then went on to hold the direction invalid for the reasons which he states as follows:

"In my view if I am right in thinking that the Commissioner is only authorised by s. 23 to give directions under that section if he considers it just and reasonable so to do, the absence of consideration by him of the justness and reasonableness of the giving of any direction would render the giving of that direction *ultra vires*. The direction itself does not recite that he had given any consideration to the justness and reasonableness of giving a direction in the instant case nor is there any evidence aliunde to that effect.

"Here, the direction is completely silent as to one of the ingredients which I regard as necessary to the giving of a direction under s. 23, that is it makes no reference to the Commissioner having determined that it was just and reasonable to give the direction."

I should here mention that though the parties to the appeal according to the title on the record are only the Commissioner and the taxpayer, in accordance with s. 115 (2) (c) of the Act copies of the appeal documents were served on Kwetu and Ibonia and counsel who appeared before the Supreme Court for the taxpayer also appeared for those two companies. I understand the same is the position on the appeal to this court.

Dealing first with the appeal, the Commissioner appeals to this court on the ground that the judge erred in law in holding that a direction had to recite the fact that the Commissioner considered it just and reasonable to make it. The appeal is based on the assumption that the decision of the judge went to form only, that is, that unless the direction recites that the Commissioner considered it just and reasonable to make the particular adjustments then the direction is bad. The taxpayer submits that it is not necessary for the direction to recite that the Commissioner considered it just and reasonable to make the adjustment

if, in fact, evidence is led that the Commissioner did consider whether the adjustment was just and reasonable. In other words, the taxpayer submits that before the direction can be held to be validly made either it must recite consideration by the Commissioner of the justness and reasonableness of the adjustments or evidence must be led to show that the Commissioner had considered that factor; and the taxpayer submits that this was the true decision of the judge, who did not merely deal with the matter as one of form. As the learned judge was dealing with the first ground of appeal before him, which appears to me to be a ground related to a question of form, and as his reference to evidence aliunde was merely incidental, I am inclined to the view that his decision was a decision based on form only. Having regard to the view which I take, it is immaterial whether the decision of the learned judge was based on a question of form only or on the absence of evidence led by the Commissioner of his consideration of the particular factor.

As I have stated, the judge in a preliminary ruling held that the onus was on the Commissioner to establish *prima facie* that he had reasonable grounds to believe that the transactions were effected for avoidance purposes and that if this was established the onus would then shift to the taxpayer. There has been no appeal against that preliminary ruling and whatever may be the views of this court as to its correctness, this court, I think, must for the purposes of this case accept such to be the position. As the learned judge has held that the Commissioner has discharged the *prima facie* onus which he placed on him, it is immaterial whether the learned judge was or was not correct in placing that onus on him. It seems to me, however, that in order to determine the questions which arise both on the appeal and on the cross-appeal it is necessary to ascertain where the ultimate onus lies if a direction under s. 23 is challenged on appeal. The particular provisions of the Act which are relevant are ss. 23, 113 and 115. Those sections, in so far as they are relevant, read as follows:

- “23. (1) Where the Commissioner has reasonable grounds to believe that the main purpose or one of the main purposes for which any transaction was or transactions were effected (whether before or after the commencement of this Act) was the avoidance or reduction of liability to tax, he may, if he determines it to be just and reasonable, direct that such adjustments shall be made as respects liability to tax as he may determine appropriate so as to counteract the avoidance or reduction of liability to tax which would otherwise be effected by the transaction or transactions:

“Provided that this sub-section shall not apply:

- (a) . . . . .
- (b) to any transaction the main purpose or one of the main purposes for which was:
  - (i) the conversion of a company which is a controlled company or which, but for this proviso, would be treated as a controlled company, into a company which is not a controlled company; or
  - (ii) to effect the succession by a resident company, incorporated for that purpose, to any business carried on by an individual or partnership; or
  - (iii) to effect the succession by a non-resident company, incorporated for that purpose, to the whole or part of any business carried on outside the territories by an individual, partnership or company.

- “(2) Without prejudice to the generality of the powers conferred by sub-s. (1), the powers conferred thereby extend:

- (a) to the charging with tax of persons who, but for the adjustments, would not be chargeable with any tax, or would not be chargeable to the same extent; and
- (b) to the charging of a greater amount of tax than would be chargeable but for the adjustments.”

“113. In every appeal to a judge under s. 111 the following provisions shall apply:

.....

- (c) the onus of proving that the assessment objected to is excessive shall be on the person assessed;
- (h) no appeal shall lie from the decision of a judge except on a question of law or of mixed law and fact.”

“115. (1) Where:

.....

- (b) under s. 23 the Commissioner may direct that such adjustments shall be made as respects liability to tax as he may determine appropriate, then any person aggrieved by any such direction may appeal therefrom to a local committee or judge, whether on the ground that the avoidance or reduction of liability to tax was not the main purpose or one of the main purposes of the transaction or transactions or on the ground that no direction ought to have been given or that the adjustments directed to be made are inappropriate;

.....

and all the provisions of this Act relating to appeals against assessments, including the giving of notice of appeal and the time within which such notice is to be given shall, so far as they are applicable, have effect with respect to any such appeal as if such appeal were an appeal against an assessment.”

Inasmuch as the latter part of s. 115 (1) states that all the provisions of the Act relating to appeals against assessments shall, so far as they are applicable, apply to any appeal against a direction under s. 23 as if such appeal were an appeal against an assessment, it would appear to me clear that the onus is on the taxpayer to prove all facts which are necessary to sustain his submission that the direction is invalid whether for one reason or another. It may be that an exception to this exists in respect of any condition precedent to the exercise of the power conferred by s. 23. It may also be that this is what was meant by the learned judge in his ruling and I shall assume that such is the position for the purposes of this case. I confess that the *Associated Contractors Ltd. v. The Commissioner of Income Tax* (Case No. 62) (1), 3 E.A.T.C. 10, which was a decision of this court (and not only of Briggs, V.-P., as the learned judge seemed to think) would appear to be authority for saying that the onus on any appeal against a direction lies on the taxpayer. With respect to the learned judge, I also consider that the United Kingdom cases to which he referred are of no assistance in East Africa on the question of onus, as the respective statutory provisions are, in this respect, quite different. The matter is, however, irrelevant as, in so far as the judge placed the onus on the Commissioner, it has been discharged. Thereafter the judge appeared to place the onus on the taxpayer and in my view he is correct in so doing.

It seems to me that the only condition precedent to the exercise of the power under s. 23 is that the Commissioner should have reasonable grounds to believe that the transaction was effected for avoidance purposes. Having that belief he can proceed to make a direction, but the direction must be both just and reasonable and appropriate; and it is to be noted that these are matters which can be determined only after the direction has been made. Assuming that the Commissioner has to prove the facts which gave rise to reasonable grounds for the required belief, it would then be for the taxpayer to prove any other facts upon which he relies to show that the direction is bad for any reason whatsoever. This being so, it appears to me to be completely unnecessary as a matter of form that the direction should recite anything other than the existence of the condition precedent and the fact that it is made under the powers conferred by s. 23. In so far, therefore, as the decision of the learned judge was that the direction was bad as a matter of form, in my view he erred. In so far as the decision of the learned judge was that no evidence had been given by the Commissioner to show that the direction was just and reasonable, in my view he also erred for the reason, as I have already pointed out, that the onus would be on the taxpayer to prove any circumstances which would found his submission that the direction ought not to have been made. I arrive at this conclusion for the reasons set out above, but in any event, in my view, the matter is put beyond doubt by illustration (e) of s. 114 of the Indian Evidence Act as applied to Kenya. This section authorises the presumption that an official act, which is proved to have been performed, has been performed regularly; and this is a presumption which is not lightly over-ridden. Here there is no doubt that the official act, that is, the making of a direction, has been performed and the only question is whether it has been performed regularly. On that question it seems to me that the court should, under s. 114, presume that it has been performed regularly; that is, that the Commissioner has considered that the adjustments which he directed to be made were both just and reasonable as well as appropriate in the absence of any evidence that he failed to consider such matters.

In my view, therefore, the learned judge was wrong in holding the direction was invalid, whether his decision related to a question of form alone or whether it included the absence of evidence on the part of the Commissioner that he had considered the justness and reasonableness of the adjustments directed to be made.

Dealing with the cross-appeal, the taxpayer asks that the judgment be affirmed upon grounds which may be summarised as follows:

1. That the judge erred in holding on the facts that the Commissioner had reasonable grounds to believe that the avoidance or reduction of liability to tax was one of the purposes of the transactions referred to in the direction.
2. That the judge erred in holding on the facts that the Commissioner had reasonable cause to believe that one of the main purposes of the division of the share capital of Ibonia was the possibility of a tax advantage.
3. That the judge erred in holding that one of the main purposes of the allotment of shares in Ibonia to Kwetu was the avoidance or reduction of liability to tax.
4. That the direction was bad in law in view of the finding that there was no manifest connection between the first and second transactions specified in the direction.

The Commissioner submits that it is not open to the appellant to raise the first three grounds of his cross-appeal as these are questions of fact and under s. 113 (*h*) no appeal lies on questions of fact. What is a question of fact, as

opposed to a question of mixed law and fact or of law alone, is one which is by no means easy of determination and is one which has occupied the attention of the courts on a large number of occasions. I think that the distinction between questions of fact and questions of law was most clearly put by Lord Radcliffe in *Edwards (Inspector of Taxes) v. Bairstow and Harrison* (2), 36 T.C. 207 at p. 227. I understand him there to say that the meaning of a word or phrase is a question of law; that where the circumstances are such that a conclusion one way or the other could be arrived at as to whether a matter came within the meaning so determined was a question of fact; and that whether there are circumstances which would entitle a conclusion one way or the other to be arrived at is a question of law. While the first two grounds of appeal set out in the cross-appeal would appear to relate to pure questions of fact, the third ground, and the argument on the first two grounds, included the question of the meaning of the words “main purpose”, with the result that questions of mixed law and fact were raised. In any event I am satisfied that s. 115 (1) (b), by specifically allowing an appeal on the ground that the avoidance or reduction of liability to tax was not the main purpose, or one of the main purposes, of the transaction, has given to the taxpayer a right of appeal on a question of fact in so far as a determination of the main purpose, or one of the main purposes, of the transaction is concerned. Consequently s. 113 (h) has no application to an appeal against a direction given under s. 23 in so far as the appeal raises any question of fact alone which can be brought within the grounds on which an appeal is permitted under s. 115 (1) (b).

The submissions of the taxpayer on the first three grounds of the cross-appeal were, as I understood them (though I confess that I had difficulty in understanding the submissions on the meaning of “main purpose”), as follows: first, a direction under s. 23 can only be made in respect of a transaction which is either artificial or fictitious; secondly, there cannot be a main purpose to avoid or reduce liability to tax unless there is a real probability that there would be a liability to tax which would be avoided and unless the transaction is incapable of explanation by reference to normal factors and unless the transaction is entered into solely for the purpose of avoiding or reducing liability to tax and for no other purpose; and thirdly, that on the evidence the judge erred in holding that any of these circumstances existed in this case.

I cannot accept that s. 23 applies only in respect of artificial or fictitious transactions. There is nothing in the main part of sub-s. (1) which in any way suggests such a proposition. The proviso to that sub-section is designed to exclude from the ambit of the section transactions which might otherwise be caught and the transactions referred to in proviso (b) are perfectly normal transactions, at least one of which is extremely common. If the section applied only to artificial or fictitious transactions then proviso (b), which is carefully drafted to exclude in certain circumstances transactions relating to a resident company and in others transactions relating to a non-resident company, is not only surplusage but most misleading surplusage. Nor can I accept that there cannot be a main purpose to effect something unless there is a real probability that such thing would eventuate. If a lottery ticket in a sweepstake, the proceeds of which are going to charity, were purchased, the purchaser when he entered into the transaction of purchase may have one or two main purposes; his main purpose may be to win a prize even though he knows that the chances of his doing so are extremely remote, and he may be unconcerned with the fact that the proceeds go to charity; or his main purpose may be to assist charity, and he may be completely unconcerned whether he wins or not; or he may have as two main purposes both the winning of a prize and the assistance of charity. To say that in the first case he has no main purpose because his chances of winning are very remote is, in my view, to do violence to the English language.



Equally, to say that the taxpayer could not have the main purpose, or one of the main purposes, of avoiding or reducing liability to tax unless there was a real probability that Kwetu would make a loss would be to do violence to the clear words of the section. I am also unable to accept that the section only applies if the transaction is incapable of explanation by reference to normal factors and if the avoidance or reduction of liability to tax is the only purpose. As regards the latter submission, this is immediately disposed of by reference to the phrase “or one of the main purposes”; and as regards the former, as I have already pointed out, the proviso to sub-section (1) refers to perfectly normal and common transactions.

To what transactions then does the section apply? The section provides a very sweeping power; is it to be construed in a way which, in effect, would enable the Commissioner to force a member of the public so to conduct his affairs that he pays the maximum of tax? In my view, the courts would lean against such a construction unless there can be no doubt that such is what the legislature intended, in which event the courts would be under a duty to give effect to that intention. Looking at the section as a whole, including sub-s. (2) and the proviso to sub-s. (1), it is clear that the legislature has deliberately given to the Commissioner very wide powers; but it is equally clear, when regard is had to the very specific terms of s. 115 (1) (b) under which a right of appeal is given in specified circumstances, that the legislature intended that the courts should scrutinise the circumstances relating to the making of any direction so as to ensure both that the exercise of the power, and the result of the exercise of the power, come within the four corners of the section. I consider that there are three requirements which must be satisfied before a direction can be said to have been properly made under the section. The first of these is that the main purpose, or one of the main purposes, of the transaction must be the avoidance or reduction of liability to tax; the second is that it must be just and reasonable that the particular adjustments should be made; the third is that the adjustments must be appropriate. As regards the first of these requirements, it is clear that the Commissioner cannot issue a direction unless he has reasonable grounds to believe that the transaction was effected for avoidance purposes. On the assumption, as has been held in this case, that this is a condition precedent and the onus is on him to prove facts which give rise to reasonable grounds for such belief, then, in my view, the courts in determining whether or not there were such reasonable grounds would apply an objective test. In other words, if on the facts it appears on a balance of probabilities that the transactions were effected for avoidance purposes, then the Commissioner has discharged that burden. But by reason of the right of appeal given under s. 115 (1) (b), which gives a right of appeal on the ground that the avoidance or reduction of liability to tax was not the main purpose, or one of the main purposes, of the transaction, it would nevertheless be open to the taxpayer to prove that in fact the transaction was not effected for avoidance purposes. In such a case the test to be adopted is the subjective test; what was the object of the taxpayer himself? If in fact the taxpayer did not have as a main purpose, or one of the main purposes, avoidance or reduction of liability to tax, then he has satisfied a specific ground on which he has been given a right of appeal, a ground which can be determined only by ascertaining what was his purpose. While we were referred to a number of English cases on English provisions which must, I think, be regarded as the origin of s. 23, yet I do not find these cases of any real assistance as they turn mainly on one or more phrases which do not appear in the East African legislation. Nor do I consider *Newton v. Commissioner of Taxation, Australia* (3) [1958] A.C. 450 of great assistance as that is a decision on quite different legislation. In *Case 62* (1), this court, while not deciding the point, assumed that the subjective test was the proper one, and I see no reason to differ from that view.

As regards the second of these requirements, I do not accept, as was submitted for the Commissioner, that the words “just and reasonable” are mere surplusage or, at most, indicative of the permissive nature of the power given by the section. In my view it is the requirement contained in these words which enables the courts to keep a check on the very wide powers of the Commissioner. It would, I think, be dangerous to attempt to lay down any general rule setting out the circumstances in which it could be said to be just and reasonable to make adjustments and, in my view, each case must be determined on its own facts. There are, however, factors to which the court would normally have regard in determining that matter; these factors would include the reason why the transaction was carried out in the particular manner, whether there has been a change from pre-existing circumstances and the reason for that change, and the incidence of the tax subsequent to the direction in comparison with what would have been its incidence before the transactions and with what would have been its incidence subsequent to the transactions but prior to the direction. If, for example, a taxpayer is entitled to income which attracts tax and he enters into transactions which result in the income ceasing to be his and the tax thereon being either avoided or reduced while still retaining directly or indirectly the benefit of that income, this might well be a case in which it would be just and reasonable to make a direction. On the other hand, if a taxpayer creates new income and in doing so chooses a method which attracts less tax than another method might have done, then the reverse might be true.

As regards the third of these requirements, as was pointed out by this court in *Case 62 (1)*, the section requires the Commissioner to make such adjustments as would be appropriate to counteract the avoidance or reduction of liability to tax and if, in fact, the adjustments made have this effect then, normally, they would be said to be appropriate.

Bearing in mind these requirements, I turn now to the facts of this case and to the findings of the judge in relation to those facts.

The first thing to be noted is that prior to September 28, 1954, a highly profitable business was carried on by the taxpayer and his brother in partnership, with the result that each of the partners would be liable to tax at the individual rate on the full amount of the profits from the partnership. On that date a resident company incorporated for that purpose succeeded to the business of the partnership. From the tax point of view this would have two results: first, unless there was a full distribution by way of dividend of the profits of the business, such profits would be liable to tax only at the company rate as opposed to the individual rate of tax; secondly, the distribution of the profits by way of dividend would be a matter within the control of the taxpayer and his brother though, by reason of a particular provision which existed in the revenue legislation in East Africa at that time, it would have been open to the Commissioner to deem 60% (or in special circumstances, 100%) of those profits to have been distributed. If, therefore, the profits of the business when distributed to the shareholders would have resulted in an individual rate of tax in excess of the company rate, the conversion of the partnership into a company was a transaction which itself might well result in the avoidance or reduction of liability to tax; but it was a transaction which was specifically excluded from the operation of s. 23 by reason of proviso (b) (ii). On the direction of the taxpayer all but one of the shares in Ibonia to which he would have been entitled on the conversion of the partnership business into a company were allotted to Kwetu. It is true that consideration, in the form of a book entry, was given to the taxpayer for this, but in all the circumstances I cannot regard this as in any way affecting the position. This allotment is the first of the transactions referred to in the direction. The taxpayer stated, and the learned judge found, that the main purpose, or one of the main purposes, of this particular transaction was the



avoidance or reduction of liability to tax, and I see absolutely no reason to differ from such a finding. It is to be noted, however, that the mere vesting of the shares in Kwetu would not of itself result in any income going to Kwetu and, consequently, would not of itself result in any avoidance or reduction of liability to tax. Before any income can arrive in Kwetu's hands there must be the declaration of a dividend on those shares. If, therefore, the vesting of the shares in Kwetu was done with avoidance purposes, of necessity there must at the same time have been envisaged the circumstance that the purpose would not be achieved unless dividends were declared on those shares; therefore it follows that the vesting of the shares in Kwetu and the subsequent declaration of the dividends, no matter how long after, must be inextricably linked and the declaration of a dividend is a necessary corollary to the implementation of the purpose of vesting the shares in Kwetu. Though the declaration of a dividend on shares may be an act which per se has nothing to do with the avoidance or reduction of liability to tax, yet if this act forms an integral part in a transaction effected with the main purpose of avoiding or reducing liability to tax, the purpose attaching to the transaction as a whole attaches equally to each act forming part of, and necessary to give effect to, the transaction as a whole.

The shares of Ibonia, as a result of the transaction, were held by the taxpayer's brother and by Kwetu. Ibonia continued to make profits which were available for distribution as dividends, but the declaration of dividends on shares which ranked *pari passu* for such dividends would result in conflicting interests. As the taxpayer's brother was non-resident in East Africa but resident in the United Kingdom, it was very much against his interest that dividends should be declared so long, of course, as he could gain access to those profits by borrowing from Ibonia, a course which he pursued. As far as Kwetu was concerned, however, the device of borrowing from Ibonia would not give effect to the main purpose, or one of the main purposes, of vesting the shares in Kwetu, as unless the profits of Ibonia came to Kwetu in the form of income resulting from dividends declared on profits which had borne tax. Kwetu would not be able to utilise its accumulated loss and claim, so far as that loss permitted, a refund of the tax paid by Ibonia on the profits. As a result of this conflict, although Ibonia continued to make profits in the years subsequent to 1954 it did not declare any dividends. In 1958 there took place the second of the transactions referred to in the direction. This was the division into different categories of the shares of the taxpayer's brother and Kwetu, which different categories did not rank *pari passu* for dividends, and the declaration of dividends only on Kwetu's shares. It is to be noted that the amount of such dividends was arrived at after regard was had to the amount which the taxpayer's brother then owed the company by reason of his borrowings. The accountant advising the taxpayer appears, somewhat surprisingly, to have said that he did not think of the tax advantage to Kwetu when advising the division of shares, though at another time he stated that his advice to the taxpayer was given with the question of tax advantage very much in mind. The learned judge in relation to this transaction accepted the evidence of the taxpayer and his accountant and said this:

"In my view, for the reasons expressed in my preliminary ruling, the burden of proof rests upon the respondent and the evidence does not establish that there is a preponderance of probability that the company, in resolving to divide its share into two categories had, as one of its main purposes, or, indeed, as one of its purposes at all, the ensuring of tax advantage in relation to Kenya income tax, although it may well have had as one of its main purposes in so dividing the share capital the avoidance of the incidence of United Kingdom income tax which would have attached to (the taxpayer's brother) had a dividend been declared upon his share-holding. Here, however, I am concerned not with the avoidance of United

Kingdom income tax, but only with avoidance of East African income tax.

“In the above view that the avoidance or reduction of liability to tax was not one of the main purposes of the transaction in relation to the division of the Ibonia Estates Ltd. share capital into two categories I am fortified by the answer of the appellant in reply to a question by the court:

.....

“In my view there is no manifest connection between the first and second of these transactions and for the reasons hereinbefore set out, I do not consider that the second transaction was intended to avoid or to reduce liability to tax.”

As I have said, there is no appeal against this finding of the judge but, in my view, the learned judge has mis-directed himself on the burden of proof and, indeed, he appears to me in this passage to have arrived at a conclusion in relation to the burden of proof different from that set out in his preliminary ruling. Further, while the division of the share capital into two separate categories may not of itself have been effected with the purpose of avoidance of tax, nevertheless, if this was the only means whereby the profits of Ibonia could reach Kwetu in the form of dividends which had borne tax, a position which was necessary to be achieved if the purpose of the original allocation of the shares in Ibonia to Kwetu was to be effected, then the purpose of that original transaction must apply equally to the transaction which enabled dividends to be declared to Kwetu without also being declared to the taxpayer's brother. The learned judge does not appear to have considered this aspect of the matter. In the result I am satisfied that the learned judge erred in coming to the conclusion that the main purpose, or one of the main purposes, of the second transaction referred to in the direction was not the avoidance or reduction of liability to tax and that there was no manifest connection between the first and second transactions. Having regard to all the circumstances of these transactions, I am satisfied that the two transactions referred to in the direction were effected with the main purpose, or one of the main purposes, of the avoidance or reduction of liability to tax. As the direction seeks to restore to the taxpayer income which would have been his but for these transactions, I am satisfied that the adjustments directed to be made are both just and reasonable and appropriate.

This leads me then to the fourth ground of the cross-appeal. The submissions on this ground are that as the judge has found that the second transaction was neither entered into for avoidance purposes nor connected with the first and as there has been no appeal from that finding, therefore the direction must still be held to be bad even if the appeal succeeds. It is this which has caused me the greatest difficulty. If the second transaction had been omitted from the direction, or if there had merely been a reference to a declaration on the specified date of the dividends on the shares held by Kwetu, the direction would, in my view, have been perfectly valid, even though, as I say, the declaration of dividends per se would not have been done with avoidance purposes. As I have said, in my view the learned judge erred as a matter of mixed law and fact in coming to the conclusion both that the second transaction had no manifest connection with the first and that it was not effected with avoidance purposes; but as there has been no appeal against that decision I consider that this court is bound to give judgment on the cross-appeal on the basis that the decision arrived at by the judge is correct. If it is correct the position then is that the Commissioner has chosen to base his direction, at least partly, upon a transaction which was not effected with avoidance purposes. I consider, as was urged by the taxpayer, that a direction stands or falls as a whole. In other words each transaction referred

to in a direction must either be effected with avoidance purposes or must be a necessary corollary to another transaction effected with avoidance purposes. This being so the direction is bad in law and the decision of the learned judge to that effect should, I consider, be affirmed on grounds other than those relied upon by him.

For these reasons I would, in so far as it relates to the form of the direction, allow the appeal with costs and I would also allow the cross-appeal with costs, with the result that I would confirm the decree of the Supreme Court. I would also grant, both on the appeal and the cross-appeal, a certificate for two counsel. The second volume of the record reproduced a large number of documents to which no reference whatsoever was made during the appeal and I would not allow the party who filed it to recover any costs in respect of that part of the record.

**Sir Trevor Gould Ag P:** I have had the advantage of reading the judgment of the learned Justice of Appeal who has set out the facts in detail, and there is no necessity for me to repeat them.

A great deal of the difficulty in this appeal arises from the findings of the learned judge on the subject of onus of proof. The requirements of s. 23 of the 1958 Act, in the matter of the giving of a direction are:

- (a) that the Commissioner has reasonable grounds to believe that one of the main purposes of a transaction was tax avoidance;
- (b) that he has determined it to be just and reasonable to give a direction; and
- (c) that he has determined that the adjustments directed are appropriate.

In his preliminary ruling the learned judge held that the burden of proof was on the Commissioner to establish *prima facie* that he had reasonable grounds for the belief mentioned at (a) above. He then held that if the Commissioner discharged that burden that it would be for the appellant to seek to show (and by that he must mean that the burden was on the appellant) that there was not in fact reasonable ground for the respondent to hold that belief. It is apparent there that the learned judge is confining himself to what is contained in s. 23 as a prerequisite for the giving of a direction. Section 115 (1) (b), which gives the taxpayer the right to appeal against a direction, specifies one of the three grounds of appeal as

“that the avoidance or reduction of liability to tax was not the main purpose or one of the main purposes of the transaction”.

This, of course, is different from the question of the Commissioner’s having reasonable grounds for such a belief though it is no doubt wide enough to include an allegation that such reasonable grounds did not exist.

In his main judgment on the appeal, which was given about three months after the preliminary ruling, the learned judge having quoted s. 115 (1) (b) said:

“... in the light of this provision it seems to me open to the appellant to contend that, although the Commissioner may have had reasonable grounds to believe that one of the main purposes of either or both of the transactions under consideration was the avoidance or reduction of liability to tax, in effect the avoidance or reduction of liability to tax was not the main purpose of either of those transaction.”

That passage may appear to put the burden of proof upon the taxpayer. Nevertheless, having considered the evidence the learned judge said:

“In my view, for the reasons expressed in my preliminary ruling, the burden of proof rests upon the respondent and the evidence does not

establish that there is a preponderance of probability that the company, in resolving to divide its shares into two categories had, as one of its main purposes, or, indeed, as one of its purposes at all, the ensuring of tax advantage in relation to Kenya income tax . . .”

In this passage the learned judge appears to be taking the opposite view and it is not clear whether he intended thereby to widen the extent of his original ruling for the same reasons that were given in that ruling or whether he was then under a misapprehension as to the actual extent of the ruling.

There has been no appeal against the preliminary ruling, nor specifically against the extension thereof, if one was intended in the passage I have just quoted, though it may well be that if the question of overall onus of proof is an essential element in the single ground of appeal contained in the memorandum it would be open to this court to come to its own conclusion on the matter. Argument was not, however, addressed to the court on those lines and I am reluctant to come to a conclusion upon such an important question in the absence of full argument. I think, however, that the appeal can be disposed of without the necessity of so doing.

As I have pointed out there are three requirements for the giving of a direction under s. 23 and the ground of appeal is concerned with the second of them. It has been contended for the Commissioner that the words “if he determines it to be just and reasonable” are intended to confer a free discretion upon the Commissioner; they ensure that the word “may” is not considered as “was” or “must”; they are almost in the nature of surplusage. I agree that they serve the purpose indicated in relation to the word “may” but nevertheless they are not surplusage and do import a requirement that the Commissioner before issuing a direction shall have addressed his mind to the question of whether it is just and reasonable to do so. I think there are a number of factors which might influence his determination in that respect. Under the second ground of appeal specified in s. 115 (1) (b) i.e. “that no direction ought to have been given” it is undoubtedly open to the taxpayer to contest whether the determination was in fact just and reasonable and perhaps whether the Commissioner did arrive at such a determination although it is difficult to envisage the latter unless bad faith were alleged.

It is useful to refer to the third requirement of s. 23 (1) which is that the Commissioner must have determined that the adjustments directed were appropriate. Corresponding to this is the third ground of appeal in s. 115 (1) (b) which is “that the adjustments directed to be made are inappropriate”.

The learned judge held that the direction was bad because it did not recite that the Commissioner had given any consideration to its justness and reasonableness and added “nor is there any evidence aliunde to that effect”. As I have indicated, the findings on the subject of onus were such that it is not clear whether the learned judge regards this as a question of form or of onus of proof. If it is a question of form I must disagree, with respect, with the proposition that any such recital was necessary. No particular form is specified in the Act and I can see no reason for saying that the Commissioner is obliged to do anything more than make it clear that he is giving the direction under the powers vested in him by s. 23. If it were necessary as a matter of form, the same consideration would apply to the third requirement, that the Commissioner had determined that the adjustments were appropriate and I cannot conceive that it is necessary to recite a matter which speaks for itself.

If the determination of the learned judge is to be regarded as based upon onus I must assume that the onus in question was similar in nature to that dealt with in the preliminary ruling; that is that it was the onus of showing not that the determination was just and reasonable but that the Commissioner had determined

that it was; in other words that he had directed his mind to the question. Similarly in the case of the third requirement there would presumably be an onus to show that he had determined that the adjustments were appropriate and not that they were so in fact. In my opinion if there is such an onus in these two cases it is discharged by presumption. The case of *R. v. Comptroller – General of Patents, Ex parte Bayer Products, Ltd.* (4), [1941] 2 K.B. 306, is not a complete parallel, but was decided on a similar principle. Under the Emergency Powers (Defence) Act, 1939, His Majesty was empowered by Order-in-Council to make such regulations

“as appear to him to be necessary or expedient to secure the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war”.

A particular regulation was made under the powers conferred but the Order-in-Council contained no express recital that it appeared to His Majesty to be necessary or expedient to make it for the purposes mentioned. Clauson, L.J., said:

“... but, as a matter of construction of the Order, I am clear (and I do not think that anyone in the course of these proceedings has thrown any doubt on the proposition) that it shows plainly that it did appear to His Majesty to be necessary or expedient to make this regulation”.

Counsel for the appellant submitted that there was no analogy between an Order-in-Council, as in the case just quoted and an administrative direction of the present kind. I agree that the analogy is not complete but the Commissioner is an official of Government and when he issues a direction specifying that it is made under a certain section of an Act which requires him to form certain opinions before making it, whether it is put as a matter of construction of the direction, as one of implication, or as one of the application of the presumption *omnia rite esse acta*, it must in my opinion be accepted that he has formed those opinions unless evidence is brought to the contrary. Illustration (e) of s. 114 of the Indian Evidence Act embodies the maxim above quoted and though I am aware that there is no general rule as to the maxim's applicability I consider it to be apt in the present case.

The question may be asked why the same considerations do not apply to the first requirement of s. 23 (1), namely that the Commissioner has reasonable grounds to believe that tax avoidance is one of the main purposes of the transaction. On that there is the learned judge's preliminary ruling from which there has been no appeal. It appears to place an onus on the Commissioner to justify his issuance of the direction under s. 23 and then, when that has been discharged, the onus is on the taxpayer to make good his appeal. Without necessarily agreeing with this method of approach I have accepted it for the purpose of the appeal. As the learned Justice of Appeal pointed out in his judgment the learned judge must have accepted that the particular onus referred to in the preliminary ruling had been discharged by the Commissioner whose counsel relied for the purpose entirely upon the statement of facts by the taxpayer. There was no submission that the onus was not discharged and the taxpayer proceeded to call evidence. As I have already indicated, the present question appears to me to rest upon an allegation that there is an onus of similar type upon the Commissioner to show that he had made the requisite determination that the direction was just and reasonable but not an onus to show that it was, in fact, just and reasonable. That seems clear from the opinion of the learned judge that the onus could be discharged by a mere recital in the direction. In my opinion it was sufficiently discharged by the presumption above referred to. There is, in fact, a distinction between the requirements of s. 23 which I have specified under the letters (a), (b) and (c) above, in that (a)

raises the question whether reasonable grounds did or did not exist for the Commissioner's belief that one of the main purposes of the transaction was tax avoidance, whereas (b) and (c) raise merely the question whether the Commissioner did or did not duly apply his mind and arrive at certain conclusions.

For these reasons I agree that the appeal should be allowed though in view of my opinion on the cross-appeal it is unnecessary to consider what the appropriate order would have been. While I have approached the question on a narrower basis than the learned Justice of Appeal I am not to be taken as expressing dissent from his opinions on the subject of overall onus.

As to the cross-appeal, I agree that it should be allowed, but base myself only upon the fourth ground of appeal. The learned judge found that one of the two transactions specified in the direction was not entered into for avoidance purposes and not connected with the other transaction and there has been no appeal from these findings. This position must, therefore, be accepted in this court and I find it superfluous to discuss the correctness or otherwise of the learned judge's decisions on the evidence. A substantial part of the basis of the direction having gone, it is not possible for this court to say whether, on what remains, the Commissioner would have considered it just and reasonable or appropriate to make this or any direction. For this reason and for those given by the learned Justice of Appeal I agree that the direction must be considered as bad in law.

The appeal and cross-appeal are allowed and the decree of the Supreme Court confirmed. There will be orders as to costs as proposed by the learned Justice of Appeal.

**Crawshaw Ag VP:** The facts, and the legal issues which arose thereon, have been fully and clearly set out by Newbold, J.A., and I do not intend to repeat them, except to say that the "direction" of the Commissioner made under s. 23 of the East African Income Tax (Management) Act, 1958, related to two transactions. The first transaction was the allocation by the respondent of his shares in Ibonia Estates Ltd. to Kwetu Farm Ltd., in which the respondent was in effect the sole shareholder. The second transaction was the division of the shares held by the respondent and his brother in Ibonia Estates Ltd. into two classes or categories.

The learned judge held that the Commissioner had "reasonable grounds to believe" that the main purpose, or one of the main purposes, of each transaction was the avoidance or reduction of liability to tax; that the "combined effect of the transactions . . . was undoubtedly to reduce liability to tax"; that one of the main purposes of the first transaction was in fact the avoidance or reduction of such liability; that there was no manifest connection between the two transactions; that as to the second transaction the Commissioner, on whom the burden of proof lay, had failed to establish that in fact the purpose, let alone the main purpose, of that transaction had been tax avoidance; that in his, the judge's, view, that was not one of the main purposes; and, finally, that the "direction" did not say that the Commissioner considered it "just and reasonable" so to direct, nor was there evidence to that effect, and for "this reason" the appeal by the taxpayer was allowed.

The relevant ground of appeal by the Commissioner to this court was in the following terms:

- "(1) that the learned judge erred in law in holding that inasmuch as the direction does not recite that the Commissioner had given consideration to the justness and the reasonableness of the direction and there being no evidence aliunde to that effect, therefore the direction was ultra vires;"



Even if the Commissioner is right in that ground of appeal (and I do not find it necessary to decide the point) it is not sufficient to upset the judgment. At most it would require the case being sent back to the trial court for a decision as to whether in fact the direction was in the circumstances just and reasonable, a conclusion which the taxpayer had expressly challenged in his grounds of appeal before the lower court, and on which the court might well have come to a different conclusion from the Commissioner, especially as the moneys concerned were all connected with agricultural pursuits in this Colony.

It seems to me, however, that the appeal must fail on other grounds. It does not question the judge's findings that there was no manifest connection between the two transactions; that the onus was on the Commissioner to prove that a main purpose of the second transaction was to avoid tax (although this finding would appear to be in conflict with an earlier ruling of the learned judge against which there was no appeal); and that in fact it was not one of the main purposes. Those findings (anyway the first and third) must therefore stand, whether correct or otherwise. That being so, it is not for us to say what, if any, direction the Commissioner would have issued had he had regard thereto.

For the above reasons I would dismiss the appeal with costs, for even if the objection taken therein is a valid one it does not in the circumstances justify the reversal of the learned judge's allowance of the respondent's appeal in the court below. The fourth paragraph of the cross-appeal raises the issue on which, for the reasons given, I think the appeal should be dismissed and it is not therefore necessary to consider the merits of the other grounds of the cross-appeal. I would allow the cross-appeal with costs. I would certify for two counsel. I agree with the observations of Newbold, J.A., as to the costs of the record.

*Appeal and cross-appeal allowed. Decree of the Supreme Court affirmed.*

For the appellant:

*PJ Treadwell and LK Waiyaki* (Asst. Legal Secretaries, E.A. Common Services Organisation)

*The Legal Secretary*, E.A. Common Services Organization

For the respondent:

*K Bechgaard, QC and Gerald Harris*

*Hamilton Harrison & Mathews*, Nairobi

**Zainab Bint Abdulla Gulab and another v Kulsum Bint Abdul Khaleq and another**

[1963] 1 EA 523 (PC)

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|--------------------------|--|
| <b>Division:</b>         | Privy Council                                    |
| <b>Date of judgment:</b> | 2 October 1963                                   |
| <b>Case Number:</b>      | 17/1962  |
| <b>Before:</b>           | Lord Jenkins, Lord Guest and Sir Kenneth Gresson |
| <b>Sourced by:</b>       | LawAfrica  |

**Appeal from:** E.A.C.A. Civil Appeal No. 34 of 1961 on Appeal From; H.M.  
Supreme Court of Aden – Gillett, J

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*[1] Mohamedan law – Gift inter vivos – Validity – Gift of house effected by purported deed of sale – Consideration stated in deed not paid – Deed registered – Donor and donee residing in the house at time of gift – Whether donor must leave house after gift – Intention of donor.*

### **Editor's Summary**

The appellants were heirs, according to Mohamedan law, of one, Gulab, who died in 1959. Gulab had once owned a house in Aden and the first respondent, a sister of Gulab's wife, had been brought up from childhood by Gulab and his wife and had lived with them for about twenty-five years. In August, 1957,



Gulab executed a document in the form of a deed of sale of his house to the first respondent, for a consideration of Shs. 25,000/-. This document was duly registered. After Gulab's death, the appellants brought an action seeking a declaration that the conveyance of August, 1957, was void and should be delivered up for cancellation, and that the property be declared to be part of Gulab's estate. This claim was based upon two allegations, first, that Gulab, at the time of the transfer, was aged seventy-two years and had been for three years infirm in mind and body, and secondly, that the transfer was a "a sham and bogus transfer", in support of which it was submitted that possession had not effectively been given by the donor to the donee. The judge dismissed the action, a decision which the Court of Appeal confirmed. On further appeal to the Privy Council it was contended, *inter alia*, that there had been no absolute relinquishment by the donor of possession of the subject matter of the gift so as to constitute a gift under Mohamedan law.

**Held –**

- (i) no departure from the property by the donor is necessary, where it has been established that both the donor and donee were residing in the house at the time of the gift; registration of the deed was an unequivocal declaration on the part of the donor to give the property;
- (ii) it was not necessary in order to perfect the gift that the donor should have vacated the house and removed his chattels, even for a time and, as the parties were living together, it was sufficient that an intention on the part of the donor to transfer possession should have been unequivocally manifested.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Mohammad Abdul Ghani and Another v. Fakhr Johan Begam and Others* (1922), 49 I.A. 195.
- (2) *Humera Bibi v. Najm-Unnissa Bibi* (1905), 28 All. 147.
- (3) *Ex parte Fletcher* (1877), 5 Ch. D. 809.
- (4) *Ismail Mussajee Mookerdum v. Hafiz Boo* (1906), 10 C.W.N. 570.

**Judgment**

**Sir Kenneth Gresson:** This was an appeal from the judgment of the Court of Appeal of Eastern Africa dismissing an appeal against a judgment of the Supreme Court of Aden, which had dismissed an action brought by the appellants, who were plaintiffs in that action. The plaintiffs (as they will be called hereinafter) were heirs according to Mohammedan law, of one, Ismail Abdulla Gulab, who in his life time, owned a house property in Aden. On August 19, 1957, Gulab executed a document in the form of a deed of sale which after reciting that Kulsum Bint Abdul Khaleq, an Indian lady, a Moslem aged 42 years, had agreed to buy the property for Shs. 25,000/-, witnessed that in consideration of such payment, the receipt of which was acknowledged, Gulab (also a Moslem) as seller transferred the land in terms usual in such conveyances of land, and including the words, "The seller hereby gives possession of the aforesaid property to the buyer". Kulsum, a sister of Gulab's wife, had been brought up from childhood by Gulab and his wife and had lived with them for about twenty-five years. The deed was duly registered in conformity with statutory provisions. After the execution of the deed, Kulsum continued to live in the

house as before. Gulab died on August 10, 1959, then about seventy-four years old.

The plaintiff in the action sought a declaration that the conveyance of August 19, 1957, was void and should be delivered up for cancellation; and that the

property be declared to be part of Gulab's estate. This was based upon two allegations, the first, that Gulab, at the time of the transfer, was aged seventy-two years and had been for three years, infirm in mind and body, secondly, that the transfer was "a sham and bogus transfer" which was in the main based upon a submission that possession had not effectively been given by the donor to the donee. It is well settled that for a gift inter vivos to be valid under Mohammedan law, three conditions are necessary: – (a) manifestation of the wish to give on the part of the donor, (b) acceptance by the donee, either impliedly or expressly, and (c) the taking of possession of the subject matter of the gift by the donee, either actually or constructively (*Mohammad Abdul Ghani and Another v. Fakhr Jahan Begam and Others* (1) (49 I.A., at p. 209)).

It was common ground that the personal law of the parties was the Mohammedan law. The relevant statute of Aden, provided that nothing therein should be deemed to exclude the rules of Mohammedan law.

In the Supreme Court of Aden, there were findings of fact that the evidence had not warranted any conclusion that Ismail had been induced to make the transfer by undue influence; that no financial consideration had passed between Kulsum and Gulab; and that there was nothing to warrant a finding that the transfer was made with intent to deprive the heirs of Ismail, of their inheritance.

These findings of fact were not challenged before the Board, but it was contended by counsel for the appellant that the transaction was not made as a gift by Ismail Gulab, during his life time, but was obtained during the infirmity of the deceased, with the intent of depriving the legal heirs of the deceased, of their rightful shares in the estate of the deceased. There was, too, a further allegation of some relevance, that the deceased had intended to transfer the property by way of gift to Kulsum, but being advised that such a transfer might be challenged as being without consideration and intended to defeat the rights of the rightful heirs, had made an ostensible sale, wherein no consideration had passed from the buyer to the seller. It was further alleged (and apparently established) that the alleged price was much below the normal value of the property. The defendant pleaded by way of defence, that the first named defendant – Kulsum – was the absolute owner of the property; denied that the transfer was without consideration and denied that the deceased wanted to transfer the property by way of gift. There are many decisions which have recognised that no departure from the property by the donor is necessary, where it has been established that both the donor and donee were residing in the house at the time of the gift, and the registration of a deed has been regarded as showing an unequivocal declaration on the part of the donor to give the property. Such a case was *Humera Bibi v. Najm-Unnissa Bibi* (2), in which the fact that the donor continued to reside in the home of her nephew, was held to be of no effect in the face of the established manifestation of the intention of the donor to transfer the property to the nephew as donee. The donor in that case was a childless widow, who had brought up her brother's son as her own son. In every case, the intention of the donor is to be looked to and each case will depend on its own facts.

Counsel for the appellant contended strongly that there had been no such absolute relinquishment by the donor of the possession of the subject matter of the gift as to constitute a gift under Mohammedan law. Their Lordships are unable to uphold this contention, for in their opinion it was not necessary in order to perfect the gift that the donor should have vacated the house and removed his goods and chattels, even for a time. Where as in this case, the parties were living together, it is sufficient that an intention on the part of the donor to transfer possession, should have been unequivocally manifested. An appropriate intention where two are present on the same property may put the one out of, as well as the other into,

possession, without any actual physical departure

or formal entry, and effect is to be given as far as possible to the purpose of an owner whose intention to transfer, has been unequivocally manifested (*Ex parte Fletcher* (3)).

It was also contended for the appellant, that the deed of sale could not be treated as a deed of gift, because the document recited a consideration – and indeed the defendant had denied that there had been any gift, and alleged that there had been a sale. But in the case of *Ismail Mussajee Mookerdum v. Hafiz Boo* (4), notwithstanding that the transaction in issue in that case purported to be a sale and the price was mentioned in the conveyance, it was held by the Board, on the evidence, to be a gift and not a sale, the question being regarded purely as one of intention. Sir Arthur Wilson, in that case said (10 C.W.N., at p. 580) the fact that the sum of Rs. 10,000 was mentioned as the price, a sum which according to the evidence, was far short of the actual value of the property, and the fact that it was not paid at all, went to show that the transaction was not a sale, but a gift with an imaginary consideration inserted “in a manner common in such transactions in India”.

Their Lordships are therefore of opinion that the judgment of the Court of Appeal for Eastern Africa was right and will humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs of the appeal.

*Appeal dismissed.*

For the appellants:

*John A Baker* (of the English Bar) and *N Hussain*  
*Hatchett Jones & Co*, London

For the respondents:

*JG Le Quesne, QC*  
*TL Wilson & Co*, London

## **Abyasali Musoke v Rene Dol** [1963] 1 EA 526 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 21 October 1963                 |
| <b>Case Number:</b>      | 4/1963                          |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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[1] *Costs – Taxation – Instructions fee – Claim and counterclaim – Judgment for plaintiff on claim and counterclaim with costs – Claim and counterclaim arising out of one transaction – Instructions fee upon counterclaim – Principle of taxation to be applied.*

**Editor's Summary**

The appellant and the respondent collided when driving their cars. The appellant claimed damages for negligence from the respondent who counterclaimed damages from the appellant for negligence. The trial judge entered judgment for the plaintiff with costs and dismissed the counterclaim with costs. At the taxation the Registrar disallowed an instructions fee to defend the counterclaim on the ground that there is no provision in the Advocates (Remuneration and Taxation of Costs) Rules, 1959, for a separate instructions fee to defend a counterclaim. On appeal,

**Held –**

- (i) where a claim and counterclaim arising out of one transaction, and involving substantially one issue, have both failed, the principle to be applied in the taxation of costs is to award to the defendant the costs of resisting the plaintiff's claim and to award to the plaintiff only such additional costs as he has incurred in defeating the defendant's counterclaim;
- (ii) the issue for determination at the trial in both the claim and the counterclaim was substantially the same, namely, who of two contestants was guilty of

negligence; accordingly the appellant was only entitled to such extra costs as had been incurred by him in defeating the counterclaim. *Wilson v. Walters*, [1926] All E.R. Rep. 412, applied.

- (iii) it is not necessary that there should be a specific provision in the Advocates (Remuneration and Taxation of Costs) Rules, 1959 authorising the charging of fees for defending a counterclaim because a counterclaim is itself a separate action and does not depend upon the original claim;
- (iv) the sum of Shs. 300/- shown in the bill of costs as an instructions fee to defend the counterclaim was an additional cost duly incurred by the appellant in defeating the counterclaim and the appellant was entitled to such costs.

Appeal allowed. Order of the Registrar set aside.

### Cases referred to in judgment:

- (1) *Wilson v. Walters*, [1926] All E.R. Rep. 412.
- (2) *Medway Oil and Storage Co. Ltd. v. Continental Contractors Ltd.*, [1928] All E.R. Rep. 330.
- (3) *Christie v. Platt*, [1921] 2 K.B. 17.

### Judgment

**Udo Udoma CJ:** In this appeal, the appellant (hereinafter referred to as “the plaintiff/appellant”) appeals against the order of the Registrar of this court disallowing costs in respect of a counterclaim which was dismissed in favour of the plaintiff/appellant who, as plaintiff, had succeeded in his claim for damages for negligence. The item of costs disallowed was numbered 17 on the bill of costs taxed by the Registrar as Taxing Master, and was entitled – “Instructions to defend counterclaim: Shs. 300/-.”

In his order disallowing the item, the Registrar said:

“*Item 17.* An instruction fee of Shs. 300/- is claimed for defending the counterclaim, in addition to the instruction fee of Shs. 300/- already claimed under Item 3. I disallow this item as there is no provision in the Advocates (Remuneration and Taxation of Costs) Rules for a separate instruction fee to defend a counterclaim. Any fees for defending a counterclaim should, in my opinion, be charged under the general instruction-to-sue item. Shs. 300/- accordingly taxed off.”

In his submission to this court, counsel for the plaintiff/appellant has contended that the Registrar was wrong in disallowing the claim for an instruction fee for defending the counterclaim because:

- “(a) such an order is inconsistent with the decree herein which specifically allows costs for defending the counterclaim;
- (b) a counterclaim is a cross-action, and no specific provision is therefore required in the Advocates (Remuneration and Taxation of Costs) Rules, 1959, in order for a claim for an instruction fee to defend a counterclaim to be allowed; and
- (c) the taxation order is illogical in holding that an instruction fee for defending the counterclaim should have been included in the instruction fee for bringing the action since, at the time when instructions to sue were given, it was not, and could not have been known whether a counterclaim would be brought or not.”

Counsel for the respondent has opposed these contentions. For the respondent (hereinafter to be referred

to as “the defendant/respondent”), he has submitted



that on the authorities of *Wilson v. Walters* (1) and *Medway Oil and Storage Company, Ltd. v. Continental Contractors, Ltd.* (2), as the claim and counterclaim arose out of the same transaction, namely, collision as a result of negligent driving of motor vehicles, and involved substantially one issue for determination, no extra costs can be said to have been incurred by the plaintiff/appellant in defending the counterclaim. He has maintained that the order of the Registrar was right and should be affirmed by this court.

Thus, the question which has been raised in this case is one of law. It is of some importance. It relates to the principle which should be applied by the Taxing Master in the taxation of costs when, as in this case, a plaintiff has succeeded both in his claim and in a counterclaim filed against him by a defendant. For the proper appreciation of the position, it is necessary to state briefly the facts as they have emerged from the proceedings, and the incidents leading to this appeal.

On December 22, 1961, there was a collision between a car driven by the plaintiff/appellant and that driven by the defendant/respondent. As is usual in such cases, the plaintiff/appellant alleged, and the defendant/respondent denied, that the collision was caused by the negligence of the defendant/respondent. Thereupon the plaintiff/appellant instituted an action in this court claiming damages against the defendant/respondent for negligence. The defendant/respondent counterclaimed also for damages for negligence.

At the trial, the plaintiff/appellant contended that the defendant/respondent was to blame for the accident. The defendant/respondent also contended that the blame was that of the plaintiff/appellant. On March 6, 1963, the court, after due trial, found for the plaintiff/appellant, both on his claim and on the defendant/respondent's counterclaim, which was dismissed. It awarded the plaintiff/appellant damages against the defendant/respondent on his claim, and costs against the defendant/respondent both on the claim and the counterclaim. The order of the court as to costs was in the following terms:

"The plaintiff will have his costs on the claim and counterclaim."

The matter then came for the taxation of costs before the Registrar as Taxing Master, who, on examining the bill of costs filed, disallowed Item 17, which was described as an instruction fee to defend counterclaim.

The question then is, was the Registrar right in law in disallowing that item of costs in the circumstances of this case? The plaintiff/appellant has answered that question in the negative, whilst the defendant/respondent, relying on the authorities already referred to herein, has answered the question in the affirmative. I now proceed to examine these authorities.

In *Wilson v. Walters* (1), two motor cars collided with each other at crossroads. The owner of one brought an action against the owner of the other, who thereupon counterclaimed. At the trial of both actions, each contended that the other was to blame for the accident. In the result, the defendant succeeded on the claim and the plaintiff on the counterclaim, both actions being dismissed. The question then arose as to how the costs should be taxed.

Costs were taxed on a certain principle by the Registrar of that court. He first took the claim, and gave the defendant the costs of resisting the claim. He then proceeded with the counterclaim, and gave the plaintiff such extra costs as he had incurred by defeating the counterclaim. Against that order there was an appeal to the county court judge. After due hearing, the county court judge reversed the order of the Registrar and applied the principle of apportionment as laid down in *Christie v. Platt* (3). On a further appeal to the Divisional Court, the decision of the county court judge was reversed and that of the

Registrar

restored. In its judgment, the Divisional Court laid down the principle for the taxation of costs in the following words:

“Where a claim and counterclaim, arising out of one transaction, and involving substantially one issue, have both failed, the principle to be applied in the taxation of costs is to award to the defendant the costs of resisting the plaintiff’s claim, and to award to the plaintiff only such additional costs as he has incurred in defeating the defendant’s counterclaim. The rule that there should be apportionment of the costs of every item common to both claim and counterclaim applies only to cases where a separate and substantial question is raised by the counterclaim.”

In *Medway Oil and Storage Company, Ltd. v. Continental Contractors, Ltd.* (2), the House of Lords, approving the decision of the Divisional Court in *Wilson v. Walters* (1), held that:

“Where a defendant has succeeded in his defence but failed in his counterclaim he is entitled to the costs which he has actually and properly incurred in defeating the claim, but he is not entitled to any costs which he would not have incurred had he not counterclaimed. The plaintiff is only entitled to such costs as he would not have incurred had he not been compelled to meet the counterclaim, but in the absence of special directions by the court there is to be no apportionment.”

The main difference between *Wilson v. Walters* (1) and *Medway Oil and Storage Company, Ltd. v. Continental Contractors, Ltd.* (2), is that the latter was a claim based on a breach of contract, while the former was a claim on tort. MacKinnon, J., in dismissing both the claim and counterclaim in *Medway Oil and Storage Company, Ltd. v. Continental Contractors, Ltd.* (2), made an order awarding costs to the defendant in respect of the claim and to the plaintiff in respect of the counterclaim. But in both *Wilson v. Walters* (1) and *Medway Oil and Storage Company, Ltd. v. Continental Contractors, Ltd.* (2), the claim and counterclaim were dismissed. Both cases are therefore, in that respect, distinguishable from the instant case, in which the plaintiff/appellant had succeeded both in his main claim against the defendant/respondent and in the defendant/respondent’s counterclaim against him. There is also a specific order awarding costs in both claims to the plaintiff/appellant.

I am of the view that the principle established in both these cases is not only logical, but reasonable and just, and should be applicable to the circumstances of the instant case. The issue which had fallen for determination by the court of trial in both the claim and counterclaim was substantially the same, namely, who, of the two contestants, was guilty of negligence? It follows, therefore, I think, that the plaintiff/appellant can only have such extra costs as have been incurred by him in defeating the counterclaim. The order by the trial judge, awarding him costs of the counterclaim, cannot mean more than this.

Applying the principle enunciated above to the case under consideration, there is, I find, substance in the submission contained in paragraph 2 (c) of the affidavit of counsel for the appellant that the Registrar was:

“illogical in holding that an instruction fee for defending the counterclaim should have been included in the instruction fee for bringing the action.”

It is not necessary that there should be a specific provision in the Advocates (Remuneration and Taxation of Costs) Rules, 1959, authorising the charging of fees for defending a counterclaim. A counterclaim is itself a separate action and does not depend on the original claim by the plaintiff. It is only for convenience that it is included in a statement of defence where it appears that the

evidence required for the purpose of establishing the counterclaim would be the same as that required for the plaintiff's claim and that at the trial similar issues would fall for decision.

I accept the uncontradicted averment in the affidavit of counsel for the appellant, and find as a fact, that at the time when instructions to sue were given, it was not, and could not have been known whether a counterclaim would be brought or not. Indeed, it would have been extraordinary for any mortal to have forecast such an eventuality. Such feats of prognostication belong essentially to the realm of seers. I am satisfied, and hold that the sum of Shs. 300/- shown under Item 17 of the bill of costs, which was disallowed by the Registrar, was an additional cost duly incurred by the plaintiff/appellant in defeating the defendant/respondent's counterclaim. The plaintiff/appellant is entitled to be reimbursed of his costs. This appeal therefore succeeds. It is allowed. The order of the Registrar disallowing that item of costs is set aside. It is ordered that the plaintiff/appellant shall have the item restored and also have the costs of this appeal.

*Appeal allowed. Order of the Registrar set aside.*

For the appellant:

*OJ Keeble*

*Hunter & Greig, Kampala*

For the respondent:

*JS Shah*

*JS Shah, Kampala*

**Paulo Kabigabwa and another v R**  
[1963] 1 EA 530 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 7 October 1963                  |
| <b>Case Number:</b>      | 434 and 435/1963                |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Criminal law – Practice – Further counts added to original charge – Additional counts during trial – Accused not informed of rights – Right to recall witnesses and adjournment – Irregularity – Prejudice to accused – Miscarriage of justice.*

**Editor's Summary**

The two appellants with other persons were charged with taking part in a riot and malicious damage to

property. After the evidence of some prosecution witnesses had been heard, the prosecuting officer applied for and was granted leave to add two new counts, namely, of threatening violence and of assault. These two new counts were directed principally against the two appellants and one other person, who was then fourth accused. The two new counts were read to the appellants and the other accused and all pleaded not guilty thereto. The magistrate then proceeded with the trial but without informing the accused concerned of their right under s. 213 (4) of the Criminal Procedure Code to have the trial adjourned if they felt embarrassed by the new counts and also to recall for cross-examination any witnesses who had already given evidence for the prosecution. All the accused were acquitted on the original two counts but the appellants and the fourth accused were convicted on the two new counts. The fourth accused did not appeal.

**Held –**

- (i) the magistrate's omission to comply with the provisions of s. 213 (4) of the Criminal Procedure Code had prejudiced the appellants, more especially since they were not represented by counsel and the counts were completely new and different from the original charge against them;

- (ii) it was incompetent for the magistrate to proceed with the trial without complying with s. 213 (4) of the Criminal Procedure Code and, as the irregularity was fundamental, the trial was a nullity;
- (iii) the charge of threatening violence contrary to s. 76 of the Penal Code as laid on which the appellants were convicted was bad for uncertainty and vagueness.

Appeal allowed. Conviction and sentence set aside.

## **No cases referred to in judgment**

## **Judgment**

**Udo Udoma CJ:** There is only one important point of law for consideration by the court which has been raised by the learned State Attorney, counsel for the respondent. He has submitted, rightly I think, that the proceedings against the appellants were incompetent and irregular in that the learned trial magistrate on amending the charge against the appellants by adding a new count thereon committed a serious error of law in failing to comply with s. 213 (4) of the Criminal Procedure Code (Cap. 24).

It appears that originally the charge against the two appellants, who were charged jointly with four other persons, comprised only two counts, namely:

- (1) taking part in a riot contrary to s. 63 of the Penal Code (Cap. 22); and
- (2) malicious damage to property contrary to s. 315 of the Penal Code.

In the course of the trial, after the evidence of some prosecution witnesses, the prosecuting officer applied for and was granted leave to amend the charge by the addition of two new counts directed principally against the two appellants and one other person, who was then fourth accused and who has not appealed to this court. The two new additional counts were as follows:

### *“Statement of Offence*

Count III. Threatening violence contrary to s. 76 (a) of the Penal Code.

### *Particulars of Offence*

That accuseds Paulo Kabigabwa and Paulo Kihirita at Kyempisi village on 1.6.63 threatened to assault members of an UPC celebration with intent to intimidate them.

### *Statement of Offence*

Count IV. Assault contrary to s. 227 of the Penal Code.

### *Particulars of Offence*

That Yoranimu Mujansi did on 1.6.63 at Kyampisi village assault Eria Mbaya.”

The two new counts thus added were read to the two appellants and the other person who has not appealed and all the three of them respectively pleaded not guilty thereto. The learned trial magistrate then proceeded with the trial but without informing the appellants of their right to have the trial adjourned, if they felt embarrassed, and also to recall any of the witnesses who had already given evidence for the prosecution for the purpose of cross-examination in the light of the additional counts.

At the close of the case for the prosecution, the learned trial magistrate held that there was no case made out against all the accused on counts 1 and 2 of the charge and thereupon dismissed them and acquitted all the accused including the appellants and the fourth accused who has not appealed. He held

that a prima

facie case had been made out against the appellants and the fourth accused in respect of the third and fourth counts and called upon them to make their defence. The learned magistrate then heard the evidence of the appellants and the fourth accused, found them guilty and convicted and sentenced them to various terms of imprisonment.

Under s. 213 (4) it is obligatory on the trial magistrate to have informed the appellants and the fourth accused of their right under the proviso to sub-s. (i) and sub-s. (ii) of s. 213 (1). It is apparent from the record that the magistrate failed to comply with the provisions of s. 213 (4). In the circumstances I am unable to hold that the appellants were not prejudiced by the omission, having regard to the fact that the appellants were not represented by counsel and that the counts were completely new and different from the original charge against them, the original charge having been dismissed by the learned magistrate. I am also unable to hold that no miscarriage of justice had been occasioned by this failure. I am of the opinion that it was incompetent for the learned trial magistrate to have proceeded with the trial without due compliance with s. 213 (4) and that the irregularity which had resulted is not a merely technical one. It is fundamental.

On the face of the record of proceedings, there are other aspects of the trial in this case which are not satisfactory. The charge, for example, as laid under s. 76 of the Penal Code and on which the appellants were convicted was bad for uncertainty and vagueness. The appellants were charged with having “threatened to assault members of an U.P.C. celebration with intent to intimidate them”. It is not clear what was meant by “an U.P.C. celebration” and whether the phrase “U.P.C. celebration” was intended to signify an organization or an institution. The evidence, however, negatives that probability in that the first witness for the prosecution in his evidence spoke of “30 of us celebrating U.P.C. success”; and the second witness spoke of “30 odd celebrators” most of them “were girls and children”. The charge should have been either amended in a manner which sufficiently identifies the person or group of persons who were alleged to have been threatened with certainty to enable the appellants to know the case they were to meet or rejected by the magistrate.

I will allow this appeal and set aside the conviction and sentence imposed on the appellants.

I think also that although the fourth accused person before the trial court did not appeal against his conviction and sentence, in view of the opinion which I have expressed in regard to the failure of the learned trial magistrate to comply with s. 213 (4), it is impossible to hold that he was rightly convicted. In the circumstances I will grant him leave to appeal and having heard the appeal I will also set aside the conviction and sentence. He and the appellants are forthwith acquitted and discharged. The court below to carry out this order.

*Appeal allowed. Conviction and sentence set aside.*

The appellants in person.

For the respondent:

AK Korde (State Attorney, Uganda)

*The Director of Public Prosecutions, Uganda*



[1963] 1 EA 533 (CAK)

**Division:** Court of Appeal at Kampala  
**Date of judgment:** 16 October 1963  
**Case Number:** 56/1963  
**Before:** Sir Ronald Sinclair P, Crawshaw and Newbold JJA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Uganda – Jeffreys Jones, J

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*[1] Hire purchase – Motor vehicle – Purchase of vehicle on credit – Purchaser unable to pay balance to dealer – Application made to finance company – Finance company willing to lend to third party – Third party enters into hiring agreement – Purported invoicing of vehicle by dealer to finance company – Instalments payable by third party guaranteed by dealer – Default by third party – Action by finance company against dealer on guarantee – Whether transaction genuine hire – purchase.*

**Editor’s Summary**

In June, 1960, the appellant sold on credit to one, D.C., a station wagon for Shs. 12,400/-. The vehicle was duly registered in the name of D.C. who in August, 1960, still owed the appellant a balance of Shs. 5,000/- of the price. When the appellant pressed for payment, D.C. asked him to go to the respondent’s office where D.C. expected to obtain a loan. On arrival there they were told that the respondent could not make a loan to D.C. but if he sold the car to somebody, the money could be lent to the buyer. The car was then sold to G.S. and on the same day the appellant signed a dealer’s invoice agreeing to sell the vehicle to the respondent and to give delivery to the “hirer” on behalf of the respondent. At the same time G.S. signed a proposal form requesting the respondent to purchase the car and a hire purchase agreement was signed by the appellant as “owner” and by G.S. “hirer”. The payments under the agreement were also guaranteed by the appellant who then received from the respondent Shs. 5,000/-. When G.S. defaulted in payment of his instalments the respondent filed proceedings against G.S. and the appellant. G.S. was not served and the case proceeded against the appellant. The appellant’s defence to the claim was that the hire purchase agreement was a sham to disguise a loan of Shs. 5,000/- on the security of the vehicle, that the agreement was in reality a bill of sale and that as the requirements of the Bills of Sale Acts and the Money-Lenders Ordinance, 1951, had not been complied with, the agreement was void and unenforceable. The trial judge rejected this defence and held that from the agreement it was clear that the respondent financed the purchase of the vehicle by G.S. On appeal,

**Held –**

- (i) the evidence indicated that there was no genuine sale of the vehicle to the respondent company and no genuine letting to G.S. and that the transaction was no more than a loan of Shs. 5,000/- on the security of the vehicle so that D.C. could repay to the appellant the balance of the purchase price owing by him;
- (ii) as the requirements of the Bills of Sale Acts and the Money-Lenders Ordinance, 1951, had not been complied with, the agreement was void and unenforceable.

Appeal allowed.

**Case referred to:**

(1) *Polsky v. S. and A. Services*, [1951] 1 All E.R. 185.

October 16. The following judgments were read:

### Judgment

**Sir Ronald Sinclair P:** In my view this appeal must be allowed.

The appellant, who was the second defendant in the suit, carried on business under the name of Tiny Motors. In June, 1960, he sold a new Gogomobile station wagon to one D.C. Patel for a net sum of Shs. 12,400/-. It was a credit sale and the vehicle was registered in the name of D. C. Patel. In August, 1960, D. C. Patel still owed the appellant Shs. 5,000/- of the purchase price and the appellant was clearly pressing him for the money. D. C. Patel told the appellant he was going to the respondent company, Credit Finance Corporation, Ltd., for a loan and he would pay the appellant in a couple of hours. He returned in less than two hours and asked the appellant to go with him to the respondent company's office as there were some forms to be signed. The appellant thereupon accompanied D. C. Patel to the company's office where they saw Mr. Raghu Pandya. The appellant, whose evidence was accepted by the learned judge, said of this visit:

“He (i.e. Mr. Raghu Pandya) said, ‘We cannot lend the money to Mr. D. C. Patel but if he sells this car to somebody, then we can lend the money to that person to buy’. The car was there sold to Gordhanbhai S. Patel. I received nothing from G. S. Patel or from him on account of the Finance and Credit Bank. An agreement was entered into between the plaintiffs and defendant (i.e. G. S. Patel). I signed the guarantee at the bottom. This is it. (Ex. A)”.

The agreement referred to is a hire purchase agreement in common form by which the respondent company, described as “the owners”, agreed to let and G.S. Patel agreed to hire, with an option to purchase, the Gogomobile station wagon in question on the terms set out therein. The price of the vehicle was stated to be Shs. 10,500/- and the agreement provided for an initial payment of Shs. 5,500/- and for the balance of the hire to be paid by twelve monthly hire rentals. The appellant signed as guarantor and was paid the sum of Shs. 5,000/- by the respondent company. He received nothing further from the respondent company or from G. S. Patel.

G. S. Patel made default in payment of the hire rentals and the vehicle was re-possessed by the respondent company in November, 1961. On March 26, 1962 the respondent company instituted this action against G. S. Patel and the appellant claiming, *inter alia*, the arrears of rental. G. S. Patel was not served and the action continued against the appellant alone.

The defence was that the hire purchase agreement was a sham and a mere colourable transaction to disguise the fact that Shs. 5,000/- was being lent on the security of the vehicle, that the agreement was in reality a bill of sale and that as the requirements of the Bills of Sale Acts and the Money-Lenders Ordinance, 1951, had not been complied with, the agreement was void and unenforceable. It is not in dispute that if in fact the transaction was a loan on the security of the vehicle, the requirements of the Bills of Sale Acts and the Money-Lenders Ordinance have not been complied with and the respondent company cannot recover.

The learned judge rejected that defence. In his judgment he set out that portion of the appellant's evidence which I have quoted and held that that evidence “immediately destroyed the defence of money-lending or the one under the Bills of Sale Act”, and that from the agreement it was clear that the respondent company financed the purchase of the vehicle by G. S. Patel.

With respect I am quite unable to agree with that conclusion. What has to be determined is whether the transaction in question is a genuine sale of the vehicle to the finance company which is finding the money and a genuine letting by the latter on hire purchase terms or whether the transaction, though taking that form, is nothing more than a loan on the security of the vehicle. The court is not to look merely at the documents, but must discover what the real transaction is: *Polsky v. S. and A. Services* (1). Here, in my view, the evidence as a whole clearly indicates that there was no genuine sale of the vehicle to the respondent company and no genuine letting to G. S. Patel and that the transaction was no more than a loan of Shs. 5,000/- on the security of the vehicle so that D. C. Patel could repay to the appellant the balance of the purchase price owing by him.

In the first place, although the hire purchase agreement describes the respondent company as the owners, there was no evidence that the company became the owners at the time of the letting; the evidence is indeed to the contrary. The appellant signed a dealer's invoice (Ex. D) purporting to show that Tiny Motors had sold the vehicle on August 10, 1960, to Credit Finance Corporation, Ltd., for Shs. 10,500/- of which Shs. 5,500/- had been paid as a deposit. There is no doubt from the appellant's evidence that that document was false; that Tiny Motors was not the owner of the vehicle at that time and that he had no right to transfer it to the company. D. C. Patel remained the registered owner until March, 28, 1962, and there is no suggestion in the evidence that he, or indeed G. S. Patel, sold the vehicle to Tiny Motors or to the respondent company. Neither D. C. Patel nor G. S. Patel were witnesses at the trial.

In the second place, it appears that the alleged initial payment of Shs. 5,500/- prescribed in the hire purchase agreement was never paid. Certainly the respondent company did not receive it from anyone. Mr. Sabarwal, Assistant Manager of the company, gave evidence that the company bought the car from Tiny Motors, that the company paid Shs. 5,000/- to Tiny Motors and that G. S. Patel paid Shs. 5,500/- to Tiny Motors on the company's behalf. But Mr. Sabarwal admitted that he had no personal knowledge of the transaction and, as I have indicated, Tiny Motors received only the Shs. 5,000/- paid to them by the company.

Again, the company does not appear to have been concerned to become the registered owners. Notification of transfer of the vehicle, which was registered in the name of D. C. Patel, was not given by the company to the Registrar of Motor Vehicles until March 28, 1962, after the plaint was issued. The notification is undated and is not signed by the registered owner, D. C. Patel, as it should have been. It stated that the vehicle had been transferred to G. S. Patel and the company.

Finally, although this may not be of great importance, the vehicle was taken to Tiny Motors for repairs by D. C. Patel, who was still the registered owner, in December, 1960, some four months after the hire purchase agreement was entered into with G. S. Patel. The inference may be drawn that there was no genuine sale by D. C. Patel and that he remained in possession of the vehicle throughout.

These factors were either not considered at all or not properly considered by the learned judge. As I have said, the totality of the evidence convinces me that the hire purchase agreement was a sham and that the real transaction was one of money-lending on the security of the vehicle so that D. C. Patel could pay to the appellant the Shs. 5,000/- which he then owed to the appellant. This Shs. 5,000/- was, indeed, the only money advanced by the respondent company in respect of the vehicle.

I would, therefore, allow the appeal, set aside the judgment and decree of the High Court and order that judgment be entered for the appellant with costs. The appellant should have the costs of the appeal.

**Crawshaw JA:** The undisputed facts are that D. C. Patel purchased a motor vehicle from a company called Tiny Motors in June, 1960. He paid all but Shs. 5,000/- of the purchase price, and when pressed for that he said he would go to the respondent company, the Credit Finance Corporation, Ltd., and obtain a loan. He and I. D. Patel, the proprietor of Tiny Motors, went to the respondent's office on August 10, 1960, for this purpose, where, according to I. D. Patel they were told:

"We cannot lend this money to Mr. D. C. Patel but if he sells this car to somebody then we can lend the money to that person to buy."

The witness went on to say, "the car was there sold to Gordhanbhai S. Patel".

On the same day a dealer's invoice was signed by Tiny Motors as owners of the vehicle agreeing to sell it to the respondent, and to give delivery of it to "the Hirer" on behalf of the respondent. At the same time G. S. Patel signed a proposal form requesting the respondent to purchase the vehicle, and a hire purchase agreement was also signed by the respondent as "owners" and G. S. Patel as "hirer". Tiny Motors purported to guarantee payments due under the agreement. The Shs. 5,000/- due by D. C. Patel to Tiny Motors was then paid by the respondent to Tiny Motors. The learned judge said, "An initial payment of Shs. 5,500/- was made" under the agreement; counsel agree that there is no reliable evidence that anyone ever received this sum, but its receipt is admitted in the plaint. Counsel for the respondent agrees with the learned judge that D. C. Patel would appear to have been the person really interested in the sum, for there is no evidence that he received back any part of the purchase price he, himself, had paid. G. S. Patel duly defaulted in payment of his instalments under the agreement, and the respondent filed a plaint against him and I. D. Patel. G. S. Patel was not served and the case proceeded against I. D. Patel as guarantor, judgment being given against him. From that judgment the appellant has appealed.

In his judgment the learned judge said that from the hire purchase agreement "it is clear that the plaintiff company financed the purchase of this car by the defendant". In the context I would read that to mean the purchase by the first defendant, G. S. Patel. He went on to say, "This case therefore must be decided on the agreement . . .".

With respect to the learned judge it seems to me that he failed to give proper consideration to the question, "was the respondent owner of the vehicle at the time of the hire purchase agreement?" In referring to the financing of the purchase of it by the respondent the learned judge would appear to have assumed that this was so. The accepted fact, however, is that up to August 10, 1960, D. C. Patel was the owner. He did not give evidence, nor did the officer of the respondent who negotiated the transaction, nor did G. S. Patel, who, we are told, could not be found. I. D. Patel, in spite of saying in evidence that the vehicle was sold to G. S. Patel, admitted the dealer's invoice in which he certified that the vehicle was his. Counsel for the respondent argues that the reference to the sale to G. S. Patel must have been to the hire purchase, and this may well have been so. There is, however, no evidence that Tiny Motors ever obtained ownership on August 10, or that D. C. Patel ever relinquished ownership. D. C. Patel was registered as owner under the traffic legislation at that time, and was still so registered at the time of the filing of this suit, although subsequently a notification of transfer, unsigned by him, was filed by the respondent.

There is no evidence that delivery of the vehicle was ever given to G. S. Patel. There is evidence that in December, 1960, it was taken by D. C. Patel to I. D. Patel's garage for repairs. It was not repaired. In November, 1961, when possession was taken by the respondent, it was found in that garage, although there is no evidence where it had been in the meanwhile.

The appellant maintains that the transaction was a fictitious one to cover a loan of Shs. 5,000/- paid by the respondent on behalf of D. C. Patel to Tiny Motors. It seems to me that, for the reasons I have given, the evidence, such as it is, leans heavily in that direction, and chiefly for lack of evidence as to change of ownership. The appellant pleaded that the alleged loan contravened the provisions of the Money-Lenders Ordinance and the English Bills of Sale Acts as applied to Uganda. I do not think it is necessary to consider those statutes for, if the evidence is not sufficient to show that the respondent had title it is clear that it could not have entered into a valid hire purchase agreement, and that being so the condition as to payment of rent was of no effect and the suit was misconceived. I would allow the appeal with costs, reverse the decision of the High Court by dismissing the respondent's claim in that court with costs.

**Newbold JA:** On August 10, 1960, a hire purchase agreement was signed by the Credit Finance Corporation, Ltd. (hereinafter called "the finance company") and Mr. G. S. Patel (hereinafter called "the hirer") whereby, according to the agreement, the finance company, described as the owners, agreed to let and the hirer agreed to hire a motor vehicle upon certain terms and conditions. Attached to that document there was a guarantee which, in general terms, was to the effect that in consideration of the finance company hiring the vehicle to the hirer, Mr. I. D. Patel (who traded as Tiny Motors and is hereinafter referred to by that name) guaranteed the payment of all sums due by the hirer under the hire purchase agreement.

The finance company claimed in an action brought on March 26, 1962, that the hirer had defaulted in his obligations under the hire purchase agreement and they accordingly sued the hirer and Tiny Motors as guarantor. The hirer does not appear to have been served and the action proceeded against Tiny Motors.

The defence of Tiny Motors, in broad outline, was that the hire purchase agreement was a purely colourable transaction; that in fact the finance company loaned a Mr. D. C. Patel certain monies at a rate of interest amounting to 12 per cent. on the security of a motor vehicle owned by D. C. Patel; and that the transaction was void because, first, it was contrary to the provisions of the Money-Lenders Ordinance, 1951, and, secondly, it contravened the provisions of the Bills of Sale Ordinance (Cap. 216).

At the trial the assistant manager of the finance company gave evidence, but it was clear that he had no personal knowledge of the transaction. The only other person who gave evidence on behalf of the finance company was the repossession agent who stated that the car had been repossessed on November 24, 1961, from Tiny Motors. On behalf of Tiny Motors Mr. I. D. Patel gave evidence that in June, 1960, he had sold the car to D. C. Patel; that in August, 1960, D. C. Patel still owed Tiny Motors Shs. 5,000/- and was being pressed for payment; that D. C. Patel, who had first visited the finance company, and himself went to the finance company where they saw an employee of the finance company who did not give evidence; that this employee stated that the finance company could not lend money to D. C. Patel but that if he, D. C. Patel, sold the car to somebody then the company could lend the money to that person to buy. Mr. I. D. Patel then continued that the car was there sold to the hirer, that the hire purchase agreement was then entered into between the finance company and the hirer; that he, as Tiny Motors, signed the guarantee and also

signed a dealer's invoice whereby he purported to sell the car to the finance company and warranted his right to do so; and that he received Shs. 5,000/- from the finance company but no other money from anyone and that he did not know what subsequently happened to the car until it was brought to his garage for repairs in December, 1960, by D. C. Patel.

An officer of the Motor Vehicle Licensing Office was called to give evidence of the entries on the register in relation to the motor vehicle. From his evidence it appears that the first owner was D. C. Patel, who was registered as such on June 10, 1960, and that there was no further transaction until the Licensing Office was notified of a change of ownership on March 28, 1962. The officer produced the notification of transfer form.

The learned judge held, if I understand his judgment correctly, that the transaction was a genuine one and gave judgment in favour of the finance company for the amount claimed against Tiny Motors. From this Tiny Motors has appealed to this court and has submitted that on the evidence the transaction was clearly a fictitious one designed to cover up the real transaction of a loan of money to D. C. Patel on the security of a motor car; that, on the authority of *Polsky v. S. and A. Services* (1), it is open to the court to go behind the hire purchase agreement and ascertain the true nature of the transaction; and that on such true nature being ascertained the transaction was void by reason of the Money Lenders Ordinance and the Bills of Sale Ordinance. The finance company does not dispute the fact that the court can go behind the documents to ascertain the true nature of the transaction; nor does it dispute that if the true nature is as submitted by Tiny Motors then the transaction is void and the appeal must succeed.

It thus appears that the sole issue on this appeal is whether or not the true nature of the transaction was the hiring by the finance company on hire purchase terms of the vehicle to the hirer.

If, in fact, the true nature of the agreement was a hire purchase agreement by the finance company as owner of the vehicle, then it is essential that the hire purchase company should have owned the vehicle at the time of the transaction. According to the Motor Vehicle Register, at no time prior to the date of the action was the finance company the owner of the vehicle. This is presumptive evidence that at the time of the transaction the finance company could not have entered into a hire purchase agreement because it did not own the car and, therefore, that the transaction was fictitious. Indeed, according to the Licensing Officer, at that time D. C. Patel was the owner. It is significant that the transfer form, on the basis of which the finance company was subsequently registered as the owner, was not received by the Licensing Office until March 28, 1962, that is after the proceedings were brought, and was not signed by D. C. Patel. It is also not in dispute that the car in question was sold by Tiny Motors to D. C. Patel in June, 1960. The evidence given on behalf of Tiny Motors was entirely consonant with the transaction being a loan on the security of a vehicle; with the ownership of the car at the time of the alleged hire purchase agreement being in D. C. Patel; and with the whole transaction being a purely colourable one. The only two witnesses for the finance company gave, and could give, no evidence to the contrary on this matter. Faced with the very strong presumptive evidence of the register, counsel for the respondent submitted that the finance company must be assumed to have purchased the car from Tiny Motors, because this is what is set out in the dealer's invoice, and that Tiny Motors must be assumed itself to have purchased the car from D. C. Patel (to whom two months before it had sold it) or to be selling the car on behalf of D. C. Patel. There is absolutely no evidence whatsoever to found this assumption; indeed such evidence as there is completely to the contrary. The learned judge appears to have overlooked the evidence relating to the register and the strange manner in



which, after action brought, the finance company was entered on the register as the owner.

In my view all the evidence points without doubt to the fact that when the hire purchase agreement was entered into the finance company did not own the car. This being so it could not let it to the hirer and, this being so, the entire transaction was a purely colourable and fictitious one designed to give a false facade to the true transaction, which was a loan by the finance company to D. C. Patel on the security of a vehicle owned by D. C. Patel.

For these reasons I am of opinion that the learned judge was wrong and would accordingly allow the appeal with costs, set aside the judgment and decree of the High Court and substitute therefor a judgment and decree dismissing the plaint as against Tiny Motors with costs.

*Appeal allowed.*

For the appellant:

*PJ Wilkinson, QC and MP Vyas*

*MP Vyas, Kampala*

For the respondent:

*OJ Keeble*

*Hunter & Greig, Kampala*

## **Bunyoro Kingdom Government v Mukebu Aguda** [1963] 1 EA 539 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 2 October 1963                  |
| <b>Case Number:</b>      | 69/1963                         |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Criminal law – African courts – Audi alteram partem – Witness – Witness held to be lying – Sentence of imprisonment – Witness not heard in his defence – Whether conviction and sentence illegal – African Courts Ordinance, 1957 (U.), s. 17 (2).*

### **Editor's Summary**

The accused was a witness in a case tried in an African court. In the judgment in that case the court held that the accused had lied to the court in the course of his evidence and thereupon convicted him for “knowingly telling the court lies, thereby intending to mislead the court” and sentenced him to four months’ imprisonment. On appeal the Bunyoro Central Court held that the offence for which the accused



was convicted was “subornation of perjury”, upheld the conviction and enhanced the sentence to six months’ imprisonment or a fine of Shs. 200/-. In revision,

**Held –**

- (i) the situation in the contemplation of the legislature, to which s. 17 (2) of the African Courts Ordinance, 1957 (U.) would apply, is such in which the court of trial considers that the offence concerned can adequately be punished with or atoned for by a fine or compensation without any necessity for a term of imprisonment, and it is only in this situation that an African court is bound to follow s. 17 (2) when imposing sentence of imprisonment in default of payment of fine or compensation;
- (ii) in the instant case a fine had been imposed by the court as an alternative punishment to a term of imprisonment which the court had considered as appropriate punishment for the offence of which the accused was convicted and accordingly s. 17 (2) was not applicable;
- (iii) as the accused was never offered any opportunity of being heard in his defence before he was convicted, the conviction was contrary to the fundamental principle of natural justice on the doctrine of audi alteram partem;

- (iv) the conviction also could not be sustained because if the charge was one of “subornation of perjury” then the person who should have been punished was not the accused but someone else who had apparently soborned him; if on the other hand, the court mistakenly dealt with the offence as subornation of perjury when in fact it was not, then the accused was wrongly convicted and the conviction should be set aside.

Conviction and sentence set aside.

## **No cases referred to in judgment**

### **Judgment**

**Udo Udoma CJ:** In this application the Courts Adviser, Western Region, seeks an order of this court setting aside the sentence of six months’ imprisonment or a fine of Shs. 200/- imposed by the Bunyoro Central Court on appeal on Mukebu Aguda, a witness who had given evidence in favour of an accused person at a criminal trial. This court is to set aside that sentence because it is said it is illegal under s. 17 (2). No ground has been advanced for this submission that the sentence is illegal nor has it been made clear to this court what Ordinance is referred to. I suppose it is expected that the court should assume that s. 17 (2) mentioned in the memorandum for revision must be s. 17 (2) of the African Courts Ordinance, 1957.

While the court is prepared in the instant case to proceed on that assumption and to examine the records forwarded to it, it must be emphasised that it is the duty of Courts Advisers when forwarding District African Courts records to this court in the exercise of the powers conferred on them by the African Courts Ordinance, to state quite clearly their authority, grounds and reasons for so doing. This is necessary because the Courts Adviser’s authority to forward such records to this court for the purpose of revision is a statutory one, it being derived from ss. 26 (1A) and 26 (1B) of the African Courts Amendment Ordinance, 1962.

Courts Advisers should always specify whether they act under s. 26 (1A) or s. 26 (1B) of the Ordinance for in either case different considerations arise; and if the complaint is that the sentence of the court is illegal the ground of such illegality must always be specified.

In the present case, it appears that on January 12, 1963, one Yosefati Byarufu was charged and tried in the Bulisa Sub-County Court for an offence contrary to native law and custom. In the course of the trial, Mukebu Aguda appeared as one of the witnesses for the accused, Yosefati Byarufu, and testified in his favour. After due hearing the Bulisa Sub-County Court on March 14, 1963 found Yosefati Byarufu not guilty, acquitted and discharged him. At the same time and in the course of its judgment it held that Mukebu Aguda lied to same time and in the course of his evidence. It thereupon convicted him for “knowingly telling the court lies thereby intending to mislead the court”, and sentenced him to four months’ imprisonment. On appeal to the Bunyoro Central Court the conviction was upheld but the sentence was enhanced from four months’ to six months’ imprisonment or a fine of Shs. 200/-. In enhancing the sentence the court said:

“As the magistrate of that court alleged in his judgment that this subornation of perjury in Bugungu is being a habit, I therefore punish the appellant more severely than the lower court so as to prevent such actions to continue.”

In the memorandum forwarding this matter to this court, the Courts Adviser has complained that the sentence of six months' imprisonment or Shs. 200/- fine, as I understand it, is illegal under s. 17 (2) of the African Courts Ordinance, presumably because the sentence seems to contravene the scale prescribed under that section.

The complaint in this case seems to me to be the same as that which was made in Criminal Revision 67 of 1963 by the same Courts Adviser and which I had dealt with in my decision in that case. In that decision I had pointed out what I now repeat, that it is doubtful whether s. 17 (2) of the African Courts Ordinance was ever intended to apply to a case of the kind now referred to this court. In the instant case a fine has been imposed by the court as an alternative punishment to a term of imprisonment which the court had considered as the appropriate punishment for the offence of which the accused person was convicted. The situation in the contemplation of the legislature to which s. 17 (2) of the African Courts Ordinance would apply is, in my view, such in which the Court of trial considers that the offence concerned can adequately be punished with or atoned for by a fine or compensation without any necessity for a term of imprisonment. In such a case where a court imposes a fine or compensation the section empowers that court also to order a term of imprisonment in default of the payment of the fine or compensation, particularly when it is conceived that an accused person may not be in a position for one reason or another to satisfy the judgment of the court.

The reason for this is not far to seek. It may be that in the view of the court, the accused concerned may not be able to afford the fine or compensation, in which event the order of the court inflicting the punishment may become impossible of performance. The order may thus be rendered nugatory and of no effect since it cannot be carried into execution. That of course is most undesirable and would be contrary to the well known principle of law that a court cannot make an impossible order.

It seems to me that it is only in a case such as has been indicated above, and not otherwise, that an African Court is bound, when imposing a sentence of imprisonment in default of the payment of a fine or compensation, to follow s. 17 (2) of the African Courts Ordinance.

In the case under consideration, however, having perused the record of proceedings, I have come to the conclusion that the conviction of Mukebu Aguda cannot be sustained not because of any illegal sentence but because the conviction is contrary to the fundamental principle of natural justice on the doctrine, *audi alteram partem*, which is, that no man should be condemned without being heard. From the records it appears that Mukebu Aguda was never offered any opportunity of being heard in his defence before he was convicted.

As already pointed out, Mukebu Aguda was only a witness and was convicted by the Sub-County Court "for telling lies to the court intending to mislead the court". The procedure adopted by the court was an unusual one. Mukebu Aguda was never told what lies he had told the court, the court merely remarking in its judgment that since it accepted the evidence of certain witnesses as true that of Mukebu Aguda could not also be true, and a fortiori he had told lies to the court and must be punished. The precise nature of the lies was never brought to the notice of Mukebu Aguda nor was he given an opportunity of being heard in his defence before being convicted and sentenced by the court.

When the matter went on appeal to the Bunyoro Central Court, the assistant chief judge held in his judgment that the offence for which Mukebu Aguda was convicted was "subornation of perjury", and as his reason for increasing the sentence said:

"As the magistrate of that court alleged in his judgment that this subornation of perjury in Bugunu is being a habit, I therefore punish the appellant more severely than the lower court so as to prevent such actions to continue."

On the face of the records this is all wrong. For, if the charge was one of “subornation of perjury” then the person to have been punished was not Mukebu Aguda but someone else who had apparently suborned him. If, on the other hand, the court mistakenly dealt with the offence as subornation of perjury when in fact it was not, then Mukebu Aguda was wrongly convicted and the conviction cannot stand. It must be set aside.

For these reasons, I feel bound to exercise the powers conferred on me under s. 27 of the African Courts Ordinance and set aside both the conviction of and the sentence imposed upon Mukebu Aguda. An order of acquittal is therefore entered in his favour and he is accordingly discharged. The court below to carry out this order.

*Conviction and sentence set aside.*

**Yakobo Uma and another v R**  
[1963] 1 EA 542 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 7 October 1963                  |
| <b>Case Number:</b>      | 418 and 419/1963                |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Criminal law – Practice – Charge – Misjoinder – Two accused – Same complainant – Alleged offences occurring at different places, on different dates and with different weapons.*

**Editor’s Summary**

The two appellants were charged jointly and tried together. The offence alleged against each appellant was “doing an act intended to cause grievous harm” contrary to s. 209 (2) of the Penal Code. The first appellant alone was charged on the first count and the second appellant alone was charged on the second count. The particulars of each alleged offence showed that the incident said to involve the first appellant had occurred on a different date at a different place and with a different weapon from that said to involve the second appellant. The complainant was the same in each count. When first brought before a magistrate, the appellants pleaded not guilty and were remanded in custody but on the hearing being resumed nine days later they each said “I wish to admit the charge, it is correct”, as a result of which they were convicted on their own pleas. On appeal,

**Held –**

- (i) the charge as laid was bad in law for misjoinder as it was not within s. 135 of the Criminal Procedure Code and, but for s. 324 (1) of the Criminal Procedure Code, the misjoinder would have been fatal to the prosecution and conviction of the appellants;

- (ii) however, the facts as disclosed by the prosecution at the trial were at variance with the charge as laid; accordingly the magistrate should have allowed the appellants to plead over, or should have entered a plea of not guilty on their behalf, particularly as the appellants were not represented by counsel; since there had been a miscarriage of justice, the appeals would be allowed.

Appeals allowed. Convictions and sentences quashed.

**Cases referred to in judgment:**

(1) *R. v. Weston* (1725), Sess. Cas. 188; 1 Str. 623.

(2) *R. v. Tucker* (1767), 4 Burr. 2046; 93 E.R. 74.

(3) *R. v. Kingston* (1806), 8 East 41; 9 R.R. 373.

(4) *R. v. Smith* (1850), 4 Cox C.C. 42.

(5) *R. v. Purchase* (1842), Car. & M. 617.

## Judgment

**Udo Udoma CJ:** In this appeal the two appellants were charged jointly and tried together by the resident magistrate, Acholi, on two separate counts, the first appellant being charged alone and only in respect to the first count of the charge, while the second appellant was charged also alone on the second count. The two counts which constituted the charge, each of which was laid under s. 209 (2) of the Penal Code, read as hereunder set forth:

### *“Statement of Offence*

Count 1. Accused 1. Doing an act intended to cause grievous harm contrary to s. 209 (2) Penal Code.

### *Particulars of Offence*

Yakobo Uma on the 2nd day of January 1963 at Toro Village, Jago Lamogi, Kilak County in Acholi District, with intent to maim, disfigure or disable or to do grievous harm to Nikola Odong, unlawfully attempted to strike the said Nikola Odong with a spear.

### *Statement of Offence*

Count 2. Accused 2. Doing an act intended to cause grievous harm contrary to s. 209 (2) Penal Code.

### *Particulars of Offence*

Akunu Odoch on the 14th day of April 1962 at Pachuge Village, Jago Lamogi, Kilak County in Acholi District, with intent to maim, disfigure or to do grievous harm to Nikola Odong, unlawfully attempted to strike the said Nikola Odong with a spear, bow and arrow.”

On January 9, 1963, when the two appellants appeared before the court and their respective counts were read to them they each pleaded and their respective pleas were recorded in the record as follows:

“Accused 1. I do not admit the offence. Count 1.  
Plea of not guilty.

Accused 2. I did not do it. Count 2.  
Plea of not guilty.”

The case was adjourned to January 18, 1963, and the appellants remanded in custody. On January 18, 1963, when hearing resumed, the proceedings as noted by the learned trial magistrate are in the following terms:

“Accused 1. I wish to admit the charge, it is correct.  
Plea of guilty entered.

Accused 2. I wish to admit the charge, it is correct.  
Plea of guilty entered.”

The learned trial magistrate thereupon convicted the appellants “on their respective pleas as charged for doing an act to do grievous harm contrary to s. 209 (2) of the Penal Code;” and after listening to and recording a statement by the prosecution of the facts, sentenced each appellant to two years’ imprisonment. Both appellants have now appealed.

At the hearing of the appeal, the learned State Attorney who appeared for the respondent indicated that he was unable to support the conviction for two reasons, namely:

- “1. Because the charge as laid is bad in law for misjoinder in that it does not fall within s. 135 of the Criminal Procedure Code; and
2. Because the facts disclosed in the record of proceedings do not support the charge and it is not clear whether the appellants had intended to admit the averments in the charge when they pleaded guilty.”

In respect to the first ground, the learned State Attorney has submitted that the charge is bad in law in that it purported to join two separate offences alleged to have been committed by two individuals on two separate and distinct occasions, that is to say, on two different dates, the first being said to have been committed by the first appellant on January 2, 1963; and the second by the second appellant on April 14, 1962; and with two different types of weapons and at two separate and distinct villages. There has been nothing to link the two incidents together except the fact that they concern the same complainant.

I am of the opinion that this submission is a sound one. It is clear from the record of proceedings that the incident stated in the first count concerned only the first appellant and that both as alleged in the charge and on the facts as stated by the prosecution it took place on January 2, 1963, while the event set out in the second count occurred on April 14, 1962, that is, long before the incident which forms the subject-matter of the first count. The second incident concerns the second appellant only. It has not been suggested either in the charge or on the facts as stated by the prosecution that the two appellants had conspired together to commit even separately the two offences charged. In any case the space of time between the two incidents would negative any such suggestion.

Under s. 135 of the Criminal Procedure Code the only persons who may be joined in one charge or indictment and tried together are:

- “(a) persons accused of the same offence committed in the course of the same transaction;
- (b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;
- (c) persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other ordinance or law) committed by them jointly within a period of 12 months;
- (d) persons accused of different offences committed in the course of the same transaction;
- (e) persons accused of any offences under chapters 26 to 30 inclusive of the Penal Code and persons accused of receiving or retaining property, possession of which is alleged to have been transferred by any such offence committed by the first named persons or of abetment of or attempting to commit either of such last named offences;
- (f) persons accused of any offence relating to counterfeit coin under chapter 3 of the Penal Code and persons accused of any other offence under the said chapter relating to the same coin or of abetment of or attempting to commit any such offence.”

The charge as laid jointly in this case is demonstrably bad in law on the ground of misjoinder. The two appellants do not appear to fall within any of the categories of persons who, under s. 135 of the Criminal Procedure Code,



may be joined in one charge and tried together. Indeed the offences alleged in both counts are several. They are separate and distinct and occurred on different occasions. It cannot even be said that the offences, for example, were committed in the course of the same transaction, nor has it been alleged either in the charge or the statement of facts that the offences were committed by the appellants jointly.

Surely this charge as it stands cries aloud for separate trials of the appellants both under the common law and under the Criminal Procedure Code. For it is a well established principle of the common law that a number of persons may not be indicted jointly for an offence which must be several. In *R. v. Weston* (1), it was held that two persons cannot be indicted together for distinct offences. In *R. v. Tucker* (2), an indictment against six persons for unlawfully exercising a trade was quashed because it was a distinct offence in each and could not be made the subject of a joint prosecution. And in *R. v. Kingston* (3), where several different defendants were charged in different counts of an indictment for offences of the same nature, it was held to be a ground for applying to the court to quash the indictment.

I am of the opinion that as the charge in this case does not fall within the ambit of s. 135 of the Criminal Procedure Code, the misjoinder is fatal to the prosecution and conviction of the appellants and the charge must be quashed. Normally this ground alone should have disposed of this appeal, but under s. 324 (1) of the Criminal Procedure Code this court is precluded from allowing any appeal in the case of any accused person who had pleaded guilty and had been convicted on such plea. That then brings me to a consideration of the second ground of appeal which is substantially that the appellants in pleading guilty did not intend to admit the facts.

In both counts of the charge each of the appellants was charged with having unlawfully attempted to strike the complainant therein mentioned with some lethal weapon. The facts as disclosed by the prosecution after the plea of guilty had been entered against the appellants, were that on the respective material dates the appellants threatened to kill the complainant. But the second appellant under allocutus stated that he had only refused to pay his tax. On a careful perusal of the record of proceedings, I am satisfied that the facts as disclosed by the prosecution were at variance with the charge as laid. In such a situation the learned magistrate should have allowed the appellants to plead over, or should have entered a plea of not guilty on their behalf, particularly as the appellants were not represented by counsel. See *R. v. Smith* (4) and *R. v. Purchase* (5).

In all the circumstances of this case I am constrained to conclude that there has been a miscarriage of justice and that in the interest of justice this appeal should be allowed and the conviction and sentence imposed on the appellants set aside. An order of acquittal is entered in favour of the appellants, who are accordingly discharged. The court below to carry out this order.

*Appeals allowed. Conviction and sentences quashed.*

The appellants did not appear and were not represented.

For the respondent:

*AK Korde* (State Attorney, Uganda)

*The Director of Public Prosecutions, Uganda*

**Daphne Parry v Murray Alexander Carson**

## [1963] 1 EA 546 (HCT)

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 30 July 1963  
**Case Number:** 140/1961  
**Before:** Sir Ralph Windham CJ  
**Sourced by:** LawAfrica

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*[1] Limitation – Application for review of judgment – Application made 95 days after delivery of judgment – Delay due to failure to appreciate implications of judgment – Whether “sufficient cause” shown for extension of time – Exercise of discretion to extend time – Indian Limitation Act, 1908, s. 5 and First Schedule, art. 162 and art. 183.*

### Editor’s Summary

Judgment in this case, which was in favour of the plaintiff, was delivered on March 8, 1963, and although it contained no specific order for payment of interest, it was common ground that such was the effect of the words “judgment will accordingly be entered for the plaintiff as prayed” when read with the prayer for interest contained in the plaint. Immediately after judgment and brief argument, the Official Receiver and the Commissioner of Income Tax, the third parties, were ordered by the court to indemnify the defendant in respect of the amount which under the judgment the latter had been ordered to pay to the plaintiff. The third parties after a lapse of 95 days applied to the court for review of the judgment as regards the order for payment of interest upon the principal sum. At the hearing of the application a preliminary point of limitation was raised on behalf of the plaintiff. It was submitted that the application was time barred and the question for decision was whether art. 173 of the First Schedule to the Indian Limitation Act, 1908, which prescribes a limitation period of 90 days, was applicable, or art. 162, which prescribes a period of 21 days.

### Held –

- (i) art. 173 applies in Tanganyika and not art. 162, by reason of s. 15 of the Interpretation and General Clauses Ordinance;
- (ii) the third parties had failed to show that they had sufficient cause for not making the application within the prescribed period of 90 days; accordingly the court could not exercise its discretion to extend time under s. 5 of the Indian Limitation Act, 1908.

Application dismissed.

### Cases referred to in judgment:

- (1) *Odendaal and the Official Receiver v. Gray*, [1960] E.A. 263 (C.A.).
- (2) *Krishna v. Chathappan* (1890), 13 Mad. 269.
- (3) *G. R. Brahman and Others v. Mt. Banaspati*, [1936] A.I.R. Nag. 246.

## **Judgment**

**Sir Ralph Windham CJ:** This is an application by the third parties in Civil Case No. 140 of 1961 for a review of this court's judgment in that suit (now reported in [1963] E.A. 91), which was dated March 8, 1963, and was delivered in the presence of all parties on that same day. This application for review was filed on June 11, 1963, that is to say 95 days after the date of the judgment.

The judgment was in the plaintiff-respondent's favour against the defendant only, but immediately after its delivery and brief argument the third parties were held to be jointly and severally liable to pay to the defendant the amount which under the judgment the latter had been ordered to pay to the plaintiff. In short they were ordered to indemnify the defendant.

Briefly, the relief sought by way of review is a modification of the judgment, in the defendant's favour and thus in favour of the third party applicants, with regard to the payment of interest upon the principal sum to which the plaintiff was adjudged to be beneficially entitled, a sum of £2,625. The judgment contained no specific order for the payment of interest, but it is now common ground that such was the effect of the words "judgment will accordingly be entered for the plaintiff as prayed", when read with the prayer for interest contained in the plaint. It is contended for the applicants that since no evidence was adduced nor argument addressed to the court on the question of the interest, which was in issue on the pleadings, the plaintiffs were not entitled to be awarded it, and that the effect of the words "judgment as prayed", with regard to the interest, was one which neither the parties nor the court itself had intended or adverted to.

Learned counsel for the plaintiff-respondent, however, has raised a point of limitation, and this must be dealt with in limine before the application can be considered on its merits. This application for a review was, as we have seen, filed 95 days after the date and delivery of the judgment. A question has arisen whether the relevant article of Schedule I to the Indian Limitation Act, 1908, is art. 162, which prescribes a limitation period of 20 days, or art. 173, which prescribes 90 days; and although the present application was filed out of time even on the 90-day period I think that the question which of the two articles is applicable calls for a decision. Article 162 prescribes 20 days from the date of the decree "for a review of judgment by any of the following courts, namely, the High Courts of Judicature at Fort William, Madras, Bombay, Lahore and Nagpur, and the Chief Court of Sind in the exercise of its original jurisdiction". Article 173 prescribes 90 days "for a review of judgment except in the cases provided for by article 161 and article 162".

To my mind there can be no doubt that it is the residuary and more general art. 173 which applies in Tanganyika, and not art. 162, whose application is specifically limited to the courts of particular Indian towns, reference to which can have no meaning in this territory. I would refer to the observations of the Court of Appeal for Eastern Africa in *Odendaal and the Official Receiver v. Gray* (1), in considering the relevance in Kenya of that part of s. 59 of the Indian Transfer of Property Act, 1882, which provides that "nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon . . ." In my judgment in that case ([1960] E.A., at p. 273), I observed that "the references to Indian towns in that section" would be "inapplicable in Kenya by reason of the provisions of s. 4 of the Indian Acts (Amendments) Ordinance (Cap. 2), which requires Indian Acts to be read in Kenya with 'such formal alterations as to names, localities . . . as may be necessary to make the same applicable to the circumstances'". So here, art. 162 must be held inapplicable in Tanganyika, by reason of s. 15 of our Interpretation and General Clauses Ordinance (Cap. 1), the relevant part of which exactly reproduces that part of s. 4 of the Kenya Ordinance which is quoted above.

The applicants, then, were five days out of time in filing their application; and it remains to decide whether they have shown "sufficient cause" for not making their application within the prescribed period, for the purpose of allowing an extension of time under s. 5 of the Indian Limitation Act, 1908. The

reasons advanced for the delay are two. First, that it was only on May 7, 1963, 60 days after the delivery of the judgment, that it first occurred to any of the parties that the undoubted effect of the words “judgment for the plaintiff as prayed” in the judgment, coupled with the prayer in the plaint, with reference to the principal sum, for “interest thereon by way of damages at the rate of 6 per cent. from January, 1957, to date of filing”, was that this interest was being awarded. On that date, May 7, it was the plaintiff’s advocate who realized this and who immediately wrote and pointed it out to the advocates of the defendant and of the applicants. The second reason, advanced by the applicants for their further delay, is that during the month following May 7, the parties were negotiating for an amicable settlement of this question of interest, and that it was only on June 7 that the applicants’ advocate was finally told that there was no prospect of a settlement. Four days later he filed his application for a review.

Applying as best I can such general principles as have been laid down for determining what may and what may not be properly held to afford “sufficient cause” for the purpose of s. 5, I am unable to see what sufficient cause the applicants had for failing to file their application within the generous period of 90 days. The first limb of their argument, advanced to account for their delay for the two months from March 8 to May 7, was that neither side realized what the terms of the judgment imported, with respect to interest. But the terms of the judgment, read with the plaint, are clear enough, as all parties now admit, and they were before the applicants from the inception. The failure of the plaintiff’s advocate also to appreciate the point affords no excuse to the applicants, for two wrongs do not make a right; and it was for the applicants, as the aggrieved parties, to make a move to have the judgment reviewed, if not to appeal against the offending part of it. In setting out the principles on which a court should act in exercising its discretion to enlarge time under s. 5 of the Indian Limitation Act, 1908, Rustomji, at p. 84 of the 5th Edn. of his *Law of Limitation*, quotes the observation in the judgment in *Krishna v. Chathappan* (2) (13 Mad., at p. 271), that the section should receive “a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant”. And see similar observations in *G. R. Brahman and Others v. Mt. Banaspati* (3).

I am unable to hold that, in failing to appreciate the clear implications of the judgment in the present case for two months, and even then only on their being pointed out to them by the other side, the applicants or their counsel were not guilty in some degree of negligence and inaction.

With regard to the month between May 7 and June 7 when the parties, now fully aware of the implications of the judgment, were negotiating for a settlement, I can see no good reason why the applicants could not, during that month and before the expiry of the 90 days, have filed their application for a review, without prejudice to the negotiations, and have withdrawn it later, if the negotiations had succeeded. That would have been the wise and sensible thing to have done.

Lastly, as regards the merits of the application itself, considered as a relevant factor in determining whether “sufficient cause” for the delay has been shown, I would go so far as to say that in my view the application has undoubted merits, and that the applicants may well be suffering some undeserved hardship, in the matter of the payment of the disputed interest, if this application is dismissed. But this is of little relevance if the applicant cannot show good cause for his delay. I would again refer to Rustomji, at p. 88, where he puts the position thus, his observations being based on a number of Indian decisions upon the proper exercise by the court of its discretion to enlarge time under s. 5:

“Though the court should no doubt give a liberal interpretation to the words ‘sufficient cause’, its interpretation must be in accordance with

judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

For these reasons I hold that the objection on the ground of limitation must succeed, with the result that this application must be dismissed with costs.

*Application dismissed.*

For the Plaintiff:

*RS Grimble*

*Fraser Murray, Thornton & Co, Dar-es-Salaam*

For the defendant:

*ED Anagnostanas*

*ED Anagnostanas, Dar-es-Salaam*

For the third parties:

*WR Wickham* (Assistant to the Law Officers, Tanganyika)

*The Attorney-General, Tanganyika*

## **Kampala General Agency (1942) Ltd v Mody's (EA) Ltd** [1963] 1 EA 549 (CAK)

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|--------------------------|---|
| <b>Division:</b>         | Court of Appeal at Kampala                      |
| <b>Date of judgment:</b> | 11 November 1963                                |
| <b>Case Number:</b>      | 60/1963   |
| <b>Before:</b>           | Sir Ronald Sinclair P, Crawshaw and Newbold JJA |
| <b>Sourced by:</b>       | LawAfrica                                       |
| <b>Appeal from:</b>      | The High Court of Uganda – Sheridan, J          |

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*[1] Sale of goods – Breach of warranty – F.O.R. contract – Goods consigned to place other than as instructed by buyer – Delivery not accepted by buyer – Whether buyer entitled to reject goods.*

### **Editor's Summary**

The appellants sold to the respondents certain goods intended for use in the respondents' cotton ginnery. The price specified in the contract was F.O.R. Mombasa, according to which delivery was to be made by "railing Mombasa" and the goods were to be delivered in instalments. The first two instalments of goods were consigned to Atura Port which was the agreed destination and the third instalment was consigned to

Soroti station on the written instructions of the respondents. When the appellants consigned the last instalment to the respondents at Alooi station, which was nearer to their ginnery, the respondents refused to accept the goods after which the appellants sued for damages for breach of contract. The defence was that the appellants had broken their contract by consigning the goods to a place other than the place of destination agreed under the contract and that this entitled the respondents to reject the goods. The trial judge found for the respondents. On appeal,

**Held** – the respondents’ action in consigning the goods to Alooi station instead of Soroti station, as instructed by the respondents, was a breach of warranty and not a breach of condition; accordingly the respondents were not entitled to reject the goods but were only entitled to damages.

Appeal allowed.

**Case referred to:**

(1) *Cork Distilleries Co. v. Great Southern and Western Rail. Co. (Ireland)* (1874), L.R. 7 H.L. 269.

November 11. The following judgments were read:

### **Judgment**

**Newbold JA:** On August 3, 1961, the Kampala General Agency (1942), Ltd. (hereinafter referred to as “the sellers”) sold to Mody’s (E.A.), Ltd. (hereinafter referred to as “the buyers”) certain goods which were intended for use in connection with the buyers’ cotton ginnery. The price specified in the contract was F.O.R. Mombasa, and according to the contract, delivery was to be made by “railing Mombasa” and the goods were to be delivered in instalments.

Under the contract the sellers were, at the cost of the buyers, to insure the goods during transport and to consign the goods to the buyers. The booking station to which the goods were to be consigned was Atura Port (Unyama Ginnery) and payment was to be made on presentation of the waybills.

The first two deliveries were made and accepted, the consignment being to Atura Port. At the end of 1961 the level of Lake Kyoga rose to such an extent that Atura Port became unusable and the railway would not accept any goods consigned to that port. In December, 1961, the Lint Marketing Board, to whom the buyers sold their cotton, issued a circular notifying ginners to deliver their cotton to Soroti station instead of to a Lake Kyoga port.

On December 23, 1961, the buyers wrote a letter to the sellers asking for the remaining goods to be consigned to Soroti station. The next instalment was consigned to Soroti station and accepted by the buyers. At this time the railway was being extended from Gulu northwards and by January, 1962, the railway, were accepting goods consigned to Alooi station, which was nearer to the buyers’ ginnery. At this time also, due to a failure of the cotton crop, the market price of the goods fell below the contract price. On January 19 the buyers wrote to the sellers stating, for the reasons set out therein, that if further goods were railed to them they would not be accepted. Shortly thereafter discussions took place between representatives of the buyers and of the sellers but no agreement could be reached and the sellers delivered the last instalment to the railway at Mombasa and consigned the goods to the buyers at Alooi station. Prior to this the Lint Marketing Board had issued another circular to ginners specifying the new stations to which ginners should deliver their goods; and in the case of Unyama Ginnery the delivery station was Alooi. The buyers refused to accept the last instalment and the sellers presented the waybills but payment was not made. The sellers appear to have obtained possession of the goods which were lying at Alooi station, and sold them in March at less than the contract price.

On May 11, 1962, the sellers filed a suit claiming damages for breach of contract. The defence was that the sellers had broken their contract by consigning the goods to a place other than the place of destination agreed under the contract and that this entitled the buyers to reject the goods; and it was also pleaded that the sellers had acted unreasonably in the circumstances in railing the goods from Mombasa and had thereby aggravated the damage. The trial judge held that because the goods had been consigned to Alooi station the buyers were entitled to refuse to accept delivery; but he also stated that if he was wrong in so holding then the sellers had not acted unreasonably and they would be entitled to recover the amount of the claim less one disallowed item. From this judgment the sellers have appealed. During the hearing of this appeal the sellers by leave of the court added as a ground of appeal that the judge erred in holding that consignment of the goods to Alooi station entitled the buyers to refuse to accept the goods instead of merely to claim for such damages, if any, as they had thereby suffered.



The buyers would only be entitled to refuse to accept the goods if the sellers had broken a condition of the contract. The judge found that it was a condition of the contract that delivery was to be made to Soroti station and that as the

sellers had broken this condition the buyers were entitled to refuse to accept delivery. The essential issue, therefore, is whether consignment to Soroti station was a condition of the contract. In order to determine this issue the first necessity is to ascertain what are the terms of the contract. The judge appears to have assumed that the contract was a C.I.F. contract for delivery at Atura Port, which subsequently became Soroti station. With respect, this is obviously incorrect. The contract in the clearest possible terms is an F.O.R. contract providing for delivery at Mombasa. This the sellers have done and they have thus complied with their duty to make delivery in accordance with the contract: see ss. 30 and 33 of the Sale of Goods Ordinance (Cap. 214). It is quite normal in an F.O.R. contract for the seller to undertake at the cost of the buyer to insure the goods during transit and to consign the goods to such station as the buyer may specify. In doing so the seller acts as the agent of the buyer and, in the absence of special circumstances, the buyer as consignee has control of the contract of carriage and may direct the carrier to deliver the goods to a place other than that specified in the waybill. See *Cork Distilleries Co. v. Great Southern and Western Rail. Co. (Ireland)* (1) (L.R. 7 H.L., at p. 277).

The position is, therefore, that the sellers have made delivery of the goods in accordance with the contract but, as agent for the buyers, have consigned the goods to a station which, though possibly more convenient to the buyers, was other than the one to which they had been instructed to consign the goods. Is this breach of instructions a breach of a condition of the contract of sale, or is it a breach of a warranty in respect of which the buyers are, under s. 53 of the Sale of Goods Ordinance, only entitled to damages equivalent to the loss resulting from the breach? A condition of a contract of sale is an obligation the performance of which is so essential to the contract that if it is not performed the other party may fairly consider that there has been a substantial failure to perform the contract. A warranty, on the other hand, is defined in s. 2 of the Sale of Goods Ordinance as

“an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purposes of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated”.

I have no doubt that the breach by the sellers of the instructions to consign the goods to Soroti station was a breach of a warranty. It was the breach of an agreement collateral to the contract of sale, which contract was for the delivery of goods F.O.R. Mombasa and which, so far as this appeal is concerned, has been performed by the sellers in its entirety. There has been no claim by the buyers for damages for the breach of the warranty and in any event the damages would appear to be purely nominal.

For these reasons I would allow the appeal, set aside the judgment and decree of the High Court and direct that judgment should be entered in favour of the sellers on their claim for an amount of Shs. 3,367/83 and costs to be taxed. As the appeal has succeeded on a ground which was added at the last moment I would make no order for the costs of the appeal.

**Sir Ronald Sinclair P:** I agree and have nothing to add. The appeal is accordingly allowed and there will be orders in the terms proposed by Newbold, J.A.

**Crawshaw JA:** I also agree.

*Appeal allowed.*

For the appellant:

*REG Russell*

*Russell & Co, Kampala*

For the respondent:  
*BD Dholakia*  
*Parekhji & Co, Kampala*

**John Kakonge v Oriental Fire & General Insurance Co Ltd**  
**[1963] 1 EA 552 (HCU)**

**Division:** High Court of Uganda at Kampala  
**Date of judgment:** 1 November 1963  
**Case Number:** 376/1963  
**Before:** Bennett J  
**Sourced by:** LawAfrica

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*[1] Insurance – Motor insurance – Discharge of insurers – Accident – Vehicle repaired on insurers’ instructions – Discharge voucher signed by insured – Action for declaration that insured not bound by discharge voucher – Allegation that discharge voucher signed under misrepresentation of fact – Estoppel.*

**Editor’s Summary**

The plaintiff was the owner of a car which he had insured with the defendant company. The car having met with an accident was repaired at a garage on instructions from the defendant company. When the plaintiff took delivery of the car, he signed a discharge voucher in which he acknowledged that the repairs had been carried out to his entire satisfaction. Later the plaintiff sued the defendant for a declaration that he was not bound by the discharge voucher on the ground that he had signed it as a result of an assurance by the repairers that the car had been restored to its pre-accident condition, and that the defendant company was still liable to indemnify him.

**Held** – the plaintiff had failed to prove that he was induced to sign the discharge voucher by any such assurance as he alleged or by any misrepresentation or concealment of a material fact and was not entitled to the declaration sought.

Action dismissed.

**Cases referred to in judgment:**

- (1) *Lyle-Muller v. A. Lewis & Co. Ltd.*, [1956] 1 All E.R. 247.
- (2) *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688.
- (3) *Porter v. Moore*, [1904] 2 Ch. 367.

**Judgment**

**Bennett J:** The plaintiff was the hirer of a Fiat car URV 617 under a hire purchase agreement, and the car was registered in his name. He insured the car with the defendant company under a comprehensive policy, the terms of which are not in evidence.

On March 8, 1963, the car met with an accident as a result of which extensive damage was done to the body work, steering, front suspension and chassis subframe. The plaintiff duly notified the defendant of the accident and the defendant caused the car to be taken to the Kampala garage of F. Boero & Co. Ltd. (hereinafter called "Boero & Co.") where it arrived on or about March 15, 1963.

On the instructions of the defendant, repairs to the car were carried out under the supervision of Mr. Gennari, a foreman employed by Boero & Co., but the repairs were not completed until June, 1963.

On June 11, 1963, the plaintiff took delivery of the car from Boero & Co. after signing a discharge voucher (Ex. P.1), in which he acknowledged that the repairs had been carried out to his entire satisfaction, and that the settlement of the repairs account by the insurers constituted a full discharge of their liability

under the policy in respect of the accident. The plaintiff, who is highly educated, read and understood the effect of the discharge voucher before signing it.

Thus far the facts are common ground. On the assumption that the policy contained the usual clause giving the insurers the option to reinstate, then if they chose to reinstate, their obligation to the assured was to have the car repaired sufficiently to restore it to its condition and value before the accident: see Shawcross on The Law of Motor Insurance (1936), p. 499.

As I understand it, the plaintiff's case is that he was entitled under the policy to have the car restored to its pre-accident condition, and that owing to poor workmanship on the part of Boero & Co. the car has not been restored to its pre-accident condition. He claims a declaration that he is not bound by the discharge voucher (Ex. P.1) and that the defendant is still liable to indemnify him. He claims to be entitled to repudiate the discharge voucher on the ground that he signed it as a result of an assurance by Boero & Co. that the car had been restored to its pre-accident condition. He alleges that in giving the assurance Boero & Co. were acting as agents for the defendant. There is no allegation in paragraph 5 of the plaint that the assurance was fraudulent or even that it was a misrepresentation. Reading the plaint as a whole, however, it would seem that the core of the plaintiff's case is that the assurance alleged to have been given by Boero & Co. was a misrepresentation of fact.

On the authority of *Lyle-Muller v. A. Lewis & Co. Ltd.* (1), and *Harnam Singh v. Jamal Pirbhai* (2), it would seem that the discharge voucher would estop the plaintiff from alleging that the repairs had not been carried out satisfactorily. The defendant acted on the plaintiff's statement by settling Boero & Co.'s account for repairs which it probably would not have done but for the plaintiff's acknowledgment that the repairs had been carried out to his satisfaction. On the other hand, the plaintiff would not be estopped by the acknowledgment if he had been induced to sign the discharge voucher by the misrepresentation or concealment of a material fact on the part of the defendant or its agents: see *Porter v. Moore* (3).

The main issue in the case is whether the plaintiff was induced to sign the discharge voucher by any misrepresentation or concealment on the part of Boero & Co., it being denied by the defendant that any representation as is alleged in paragraph 5 of the plaint was made.

In order to decide this issue it is necessary to consider whether the repairs were in fact carried out satisfactorily. According to Mr. Kessemakers, an automobile engineer who examined the car at the request of the plaintiff after the repairs had been carried out, there were still a number of defects at the time of his examination. The major defects, according to Mr. Kessemakers, were the poor repairs carried out to the chassis subframe assembly and front bulkhead, and the general poor finish of the repairs. He considered that Boero & Co. could have done a very much better job on the subframe and bulkhead, but conceded that in actual practice it was never possible to bring a car which had been involved in so serious an accident into its pre-accident condition. While I think Mr. Kessemakers was inclined to make mountains out of molehills, I accept his evidence that the work done on the chassis subframe and bulkhead was not completely satisfactory, and that other jobs had been poorly finished.

The plaintiff testified that before taking delivery of the car and signing the voucher he was assured by Anil Patel, a reception clerk employed by Boero & Co., that the car had been fully repaired and restored to its pre-accident condition. Patel, on the other hand, testified that all he said to the plaintiff was that the car had been fully repaired. The expression "pre-accident condition" smacks of lawyers' jargon, and it is not the kind of expression likely to be used by a garage reception clerk.

I was favourably impressed by Patel's demeanour in the witness box and I do not believe that he ever represented that the car had been restored to its pre-accident condition. I am satisfied that Patel made no representation as to the quality of the workmanship and it is plain from Mr. Kessemaker's evidence, that it is the quality of the workmanship which is being impugned. There is no suggestion that repairs which ought to have been carried out were not carried out. Patel's statement that the car had been fully repaired was not, in my opinion, a misrepresentation of fact. Moreover, I am satisfied on the evidence of Patel, that before the plaintiff signed the discharge voucher, he took the car for a short trial run. It was as a result of the trial run rather than in consequence of anything said by Patel that the plaintiff came to sign the discharge voucher.

The plaintiff, having failed to prove that he was induced to sign the discharge voucher by misrepresentation or concealment of a material fact is not entitled to the relief which he seeks.

The suit is dismissed and the plaintiff will pay the defendant's costs.

*Action dismissed.*

For the plaintiff:

*JS Shah*

*JS Shah, Kampala*

For the defendant:

*YV Phadke*

*Parekhji & Co, Kampala*

**Savitaben Arvindbhai Patel v Barclays Bank DCO and another**  
[1963] 1 EA 554 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 13 July 1962                    |
| <b>Case Number:</b>      | 833/1961                        |
| <b>Before:</b>           | Jones J                         |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Fatal accident – Damages – Assessment – Contributory negligence – Claim by widow for death of husband – Husband's contributory negligence – Whether damages reduced by contributory negligence – Apportionment between widow and children.*

**Editor's Summary**

In an action arising out of an accident in which the plaintiff's husband was killed, the trial judge in his

judgment on the issue of liability apportioned the blame as to 60 per cent. to the plaintiff's husband and as to 40 per cent. to the defendants. An appeal from this decision was dismissed and the case was remitted to the trial judge for assessment of general damages. It was common ground that the plaintiff's husband was a sales manager employed by the third party and that at the time of his death he was earning Shs. 900/- per month plus a bonus which varied from about Shs. 3,000/- to Shs. 8,000/- per year according to the profits made. The plaintiff's husband was 31 years of age at his death, his widow was aged 32 years and his two sons were 9 and 11 years old. He was in good health and had good prospects with his employers. The court assessed the dependency at £8,625 and the periods of dependency of the widow and the two sons at 30 years, 12 years and 10 years respectively. The main issue at the hearing was whether the damages should be reduced by the share of the blame attributable to the deceased.

**Held –**

- (i) the plaintiff was only entitled to 40 per cent. of £8,625, that is, £3,450, as the blame attributable to her husband was 60 per cent. *Davies v. Swan Motor Co. (Swansea) Ltd.* (1), applied.

- (ii) as the wife's dependency was assessed at 30 years and the others at 12 years and 10 years the wife would be awarded 3/5ths of £3,450, i.e. £2,070, and each child 1/5th, i.e. £690.

Order accordingly.

### **Case referred to:**

- (1) *Davies v. Swan Motor Co. (Swansea) Ltd.*, [1949] 1 All E.R. 620.

### **Judgment**

**Jones J:** This is an action arising out of an accident on the Fort Portal-Kasese Road on January 23, 1961, when the plaintiff's husband was killed.

The facts and the question of liability were dealt with in a judgment dated July 13, 1962, when this and three other actions arising out of the same accident were dealt with in Civil Case No. 832/61. The Court of Appeal for East Africa dismissed an appeal from that judgment on December 11, 1962.

This matter now comes before me for the assessment of damages. There was a claim for Shs. 500/- funeral expenses. That was not disputed. I give the plaintiff Shs. 500/- special damages.

I now deal with the general damages. The following facts are admitted. The plaintiff's husband was a sales manager employed by Champion Motor Spares Limited, Fort Portal. At the time of his death he was earning Shs. 900/- per month plus bonus, which varied from about Shs. 3,000/- to Shs. 8,000/- per year according to the profits made during the year.

He was 31, with a wife aged 32 (the plaintiff) and two boys aged 9 and 11 at the date of his death. He was healthy and sound in mind and limb.

From what could be ascertained from his bosses, he was a quiet, ordinary man, competent at his work, with good prospects. Had he gone on in the firm in his present post he would have been earning today something like Shs. 1,200/- per month plus bonus, which last year would have been Shs. 5,000/-. In fact the managing director of the firm said that they had intended making him a director of the company after he had taken leave in March of the year he was killed. What his salary or bonus would be had he been made a director was not brought out in evidence. There is nothing on the record to show what the present salary of the two directors who gave evidence is. The managing director seems to get a bonus ranging from Shs. 8,000/- to Shs. 10,000/- per year.

The fact that the managing director said that they intended making the deceased a director could not be challenged, but it is significant that the other director (P.1) did not mention the fact in his evidence. Be that as it may, it is undoubtedly true that he was well established in a prosperous company.

From the evidence, he appeared to have spent most of his salary, if not a little more, on his and his family's maintenance. It is not unnatural that with the growth of his children, with their greater demands, the general picture of his life would not be changed, i.e. he would be spending his salary at least on the upkeep of his family.

What was that likely to be? There is no evidence of what it could be either (1) on the highest level of his present grade, or (2) as a director, if he ever became one.



It was suggested by counsel for the defendants that I should assess the dependency at Shs. 1,000/- per month, whereas counsel for the plaintiff put it at

Shs. 1,500/-. Having regard to the fact that he used to spend a little more than his salary, and having regard to the fact that we know for certain he would not be earning less than Shs. 1,200/- per month now, a figure of Shs. 1,250/- per month would be nearer the mark. I therefore assess the dependency at Shs. 1,250/- per month or £750 per year.

It becomes necessary for me now to deal with the period of dependency. Counsel for the defendants suggested I should adopt 25 years as his working life. He was 31 at his death, and healthy. There is a long history of longevity in his family. His father was 80 when he died; his mother, who is still alive, is 78; and his grandfather was 90. Presumably they all lived in India. The deceased came here in 1956. The average age of Indians dying in East Africa is considerably less than the ages of any of the antecedents above, but there are no authentic actuarial figures. It would not be unreasonable, however, I think, to give the deceased 30 more years of working life. That would give the wife, who is not likely to get married as it would be contrary to their custom, a dependency of 30 years. The children, being 9 and 11, could look forward to 12 and 10 years of dependency, i.e. until they reach 21. The average period of dependency would therefore be between 17 and 18 years for the three dependants.

As their interest in the amount they could expect by way of dependency is accelerated, the present value of this dependency must be calculated. Consulting the tables in Whitaker's Almanack, 1963, the multiplier if the period of dependency is 17 is 11.27, and if 18, 11.67. I think a multiplier of 11.5 would be equitable in the circumstances. That is, the present value of the amount due to them would be £750 X 11.5, i.e. £8,625.

The dependants would have been liable to that amount if the deceased had not been to blame, and I would have so awarded. Where, however, he dies partly through his own fault (and as this is an action brought for the benefit of his estate), s. 15 (1) and (4) of the Law Reform (Miscellaneous Provisions) Ordinance applies:

"15. – (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Provided that –

- (a) this subsection shall not operate to defeat any defence arising under a contract;
- (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant shall not exceed the maximum limit so applicable.

\* \* \* \*

- (4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under Part III of this Ordinance, the damages recoverable would be reduced under subsection (1) of this section, any damages recoverable in an action brought for the benefit of the member of the family of that person under Part II of this Ordinance, shall be reduced to a proportionate extent."

There is a similar provision in the Law Reform (Contributory Negligence) Act, 1945, ss. 1 (1) and 4. This section was dealt with and applied in *Davies v. Swan Motor Co. (Swansea) Ltd. (1)*, in which Swansea Corporation and James

were third parties. There the plaintiff's husband died as a result of injuries received when he was knocked off the step of a corporation lorry by an omnibus.

The Court of Appeal found that all three parties were to blame for various and different reasons, i.e. the omnibus driver, the third party and the deceased. The share of the deceased's responsibility was assessed at 1/5th. The court held that by virtue of the Law Reform (Contributory Negligence) Act, 1945, the damages claimable by the wife were to be reduced by 1/5th, the amount of the blame.

In this case, I have already allotted the blame to an amount of 60 per cent. on the third party, the plaintiff's husband.

Acting on the authority of *Davies v. Swan Motor Co. (Swansea) Ltd.*, the plaintiff is therefore only entitled to 40 per cent. Of £8,625, which is £3,450.

As the wife's dependency is 30 years, and the others 12 and 10, I would give the wife 3/5th of £3,450, i.e., £2,070, and each child 1/5th, i.e. £690 apiece.

The various items of damage are to be paid in the following proportion: 40 per cent, by the first and second defendants and 60 per cent. by the third party.

*Order accordingly.*

For the plaintiff:

*PJ Wilkinson, QC and B de Silva*  
*Wilkinson & Hunt, Kampala*

For the defendants:

*AI James*  
*Hunter & Greig, Kampala*

For the third party:

*YV Phadke*  
*Parekhji & Co, Kampala*

**Abasi Balinda v Frederick Kangwamu and another**  
**[1963] 1 EA 557 (HCU)**

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 31 October 1963                 |
| <b>Case Number:</b>      | 3/1962                          |
| <b>Before:</b>           | Bennett J                       |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Practice – Review – Election petition – Petition successful – Order for costs – application for review of order for costs – Ground for review that judge took erroneous view of evidence and law – Whether application competent – Jurisdiction – Civil Procedure Ordinance (Cap. 6), s. 83 (U.) – Civil Procedure Rules Order, 42 (U.).*

### **Editor's Summary**

At the hearing of an election petition which was granted, the petitioner, an unsuccessful candidate, and the second respondent, as returning officer, were awarded costs against the first respondent who was the successful candidate at the election but the petitioner was also ordered to pay the costs of the second respondent, on the ground that the second respondent was not a necessary party since his conduct was not impugned. The first respondent then applied for a review of the order for costs under Order 42 of the Civil Procedure Rules and contended that the court took an erroneous view of the evidence and of the law in holding that the second respondent was not a necessary party to the petition.

### **Held –**

- (i) a point which may be a good ground of appeal may not be a ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for an appeal;

- (ii) s. 83 of the Civil Procedure Ordinance and Order 42 of the Civil Procedure Rules do not apply to election petitions, and the court had no jurisdiction to review its order for costs.

Application dismissed.

## **No cases referred to in judgment**

## **Judgment**

**Bennett J:** This is an application under Order 42 of the Civil Procedure Rules for a review of an order for costs made in respect of the hearing of an election petition. The petitioner was the unsuccessful candidate in the South East Ankole Electoral District at the general election held on April 25, 1962. The first respondent was the successful candidate and the second respondent was the returning officer. The petition succeeded and the election was declared void on the grounds of misconduct on the part of one of the polling agents of the first respondent, by reason of which the majority of electors may have been prevented from electing the candidate whom they preferred.

The court ordered the first respondent to pay the petitioner's costs being of opinion that the first respondent ought not to have opposed the petition. The court also ordered the petitioner to pay costs of the second respondent, being of the opinion that the second respondent was not a necessary party since his conduct was not impugned.

The present application is made by the first respondent and I have been asked to vary my order for costs by directing that the second respondent do pay the costs of the petitioner and of the first respondent.

It is plain from paragraphs 4 and 5 of the affidavit in support of this application and from the contentions of counsel, that the court is being asked to review its order for costs on the ground that the court is said to have taken an erroneous view of the evidence and of the law relating to the question whether the returning officer was a necessary party to the petition. It is contended that the court took an erroneous view of the law in holding that the returning officer was not a necessary party and that the court ought to have held the returning officer to be vicariously responsible for the failure of a presiding officer to stop misconduct at a polling station by reason of which the election was declared void.

Section 83 of the Civil Procedure Ordinance confers upon this court jurisdiction to review its own decisions in certain circumstances, and Order 42 prescribes the conditions subject to which and the manner in which that jurisdiction shall be exercised.

Order 42, r. 1 of the Uganda Civil Procedure Rules is identical with Order 47, r. 1 of the Indian Civil Procedure Rules. In the A.I.R. Commentaries on The Code of Civil Procedure By Chitaley & Rao (4th Edn.), Vol. 3, p. 3227, the learned authors, in explaining the distinction between a review and an appeal, have this to say:

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”

In the circumstances I do not consider that this would be a proper case for the court to exercise the jurisdiction conferred upon it by s. 83 of the Civil Procedure Ordinance.

However, my main ground for rejecting this application is that, in my opinion, neither s. 83 nor Order 42 applies to election petitions. Counsel for the first respondent sought to import the provisions of s. 83 and Order 42 by relying upon direction 22 of the Election Petition Directions, 1958 (Legal Notice 224/58) which reads:

“Subject to the provisions of these directions, the practice and procedure in respect of the trial of a petition shall be regulated, as nearly as may be, in accordance with the provisions of the Civil Procedure Ordinance, and the rules made thereunder relating to the trial of a suit in the High Court.”

It is plain from the wording of the direction that the only provisions of the Civil Procedure Ordinance and of the Rules which have been applied to election petitions are the provisions relating to the trial of a suit in the High Court. The words “trial of a suit” might embrace such matters as the summoning and attendance of witnesses, which is the subject of Order 14; the prosecution of suits and adjournments, which is the subject of Order 15; the hearing of the suit and examination of witnesses, which is the subject of Order 16; and the proof of particular facts by affidavit, which is the subject of Order 17. To apply the Civil Procedure Rules indiscriminately would be to ignore the words “In respect of the trial of a petition” and the words “relating to the trial of a suit in the High Court” which occur in direction 22.

Counsel endeavoured to surmount the obvious difficulty in which he was placed by arguing that an application for a review was a continuation of the trial. He did not cite any authority in support of that proposition, nor have I been able to discover any. The argument does not appeal to me. It appears from Order 42, r. 6, that a successful application for a review will result in a re-hearing of the case. The re-hearing of the case, in whole or in part, might conceivably be regarded as a continuation of the original trial but, in my judgment, the application for review cannot be so regarded. Like an appeal or application for revision it is a separate proceeding. For these reasons I am of the opinion that s. 83 and Order 42 do not apply to election petitions, and that the court has no jurisdiction to review its order for costs.

The application is dismissed.

*Application dismissed.*

For the petitioner:

*Anil Clerk*

*Mayanja Clerk & Co, Kampala*

For the first respondent:

*AWK Mukasa*

*Kiwanuka & Co, Kampala*

For the second respondent:

*Lule (State Attorney, Uganda)*

*The Attorney-General, Uganda*

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 1 July 1963  
**Case Number:** 116/1962  
**Before:** Spry J  
**Sourced by:** LawAfrica

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*[1] Hire purchase – Failure of consideration – Impossibility of performance – Motor vehicle totally destroyed through collapsing bridge – No wrongful act or omission by hirer alleged – Duty of hirer to insure – Vehicle not so insured – Whether parties relieved of obligations under agreement by destruction of vehicle.*

### **Editor's Summary**

Under a hire purchase agreement the plaintiff company had hired a lorry to the first defendant with an option to purchase. After the third instalment had become due but before it was paid, the vehicle was destroyed through a river bridge collapsing. The first defendant paid the third instalment but denied liability to pay any further instalment, whereupon the plaintiff company terminated the hiring and sued the first defendant for Shs. 28,705/05 less an ex gratia payment of Shs. 13,000/- paid by his insurers who repudiated liability under the policy of insurance. The main issues were (a) whether destruction of the vehicle relieved the parties from their obligations under the agreement, (b) whether the first defendant had in breach of the agreement failed to maintain the vehicle in proper repair, (c) whether the termination of the hiring by the plaintiff was unlawful and (d) whether the plaintiff had suffered any and, if so, what loss. The first defendant contended that he was not in breach of the maintenance clause and that as the subject matter of the contract was destroyed, the parties were discharged from their obligations. It was not suggested that the vehicle was destroyed through any wrongful act or omission of the first defendant or that the vehicle had not been properly maintained prior to the accident. The agreement provided that the defendant should forthwith at his own expense insure the vehicle “against all the usual risks including loss or damage” by accident, that in the event of the loss of or serious damage to the vehicle the defendant would assign his rights under the policy to the plaintiff and that if the owner should agree to any modification or restriction in the insurance cover or if for any other reason the goods were not fully covered by insurance, the hirer would indemnify the owner against any loss thereby sustained.

### **Held –**

- (i) it had not been suggested at any stage of the proceedings that the accident was not one which could have been covered by an ordinary comprehensive policy, and in view of provisions of the agreement as to insurance, it was not open to the defendant to plead either failure of consideration or impossibility of performance;
- (ii) clause 5 of the agreement relating to maintenance of the vehicle was not relevant in the circumstances;
- (iii) the termination of the hiring by the owners was lawful;
- (iv) the plaintiff company had suffered loss and under clause 11 of the agreement was entitled to damages limited to Shs. 11,901/24.

Judgment for the plaintiff accordingly.

**Cases referred to in judgment:**

(1) *Bank Line Ltd. v. Arthur Capel & Co.*, [1919] A.C. 435.



(2) *Financings Ltd. v. Baldock*, [1963] 2 W.L.R. 359; [1963] 1 All E.R. 443.

(3) *Yeoman Credit Ltd. v. Waragowski*, [1961] 1 W.L.R. 1124; [1961] 2 All E.R. 145.

## Judgment

**Spry J:** These proceedings arose out of a hire purchase agreement (to which I shall refer as the agreement) dated September 1, 1961, whereby the plaintiff company hired a motor lorry to the first defendant (to whom I shall refer as the defendant), with an option to purchase. (The second defendant, who was a guarantor, took no part in these proceedings.) The hirer paid three instalments. After the third instalment had become due but before it was paid, the vehicle was lost as the result of a river bridge collapsing and was beyond repair when eventually found. The defendant paid the third instalment but denied liability to pay any further instalments, and eventually the plaintiff company, by a letter written by its advocates, terminated the hiring. The plaintiff company now claims a sum of Shs. 28,705/05 (I shall consider later the manner in which this figure was arrived at). It offers against this a credit for Shs. 13,000/- being a sum paid to the plaintiff company ex gratia by the defendant's insurers who have repudiated liability under the defendant's policy of insurance. The defendant denies liability, contending that the total destruction of the vehicle discharged both parties from their liability under the agreement.

The issues framed by the court were as follows:

1. Whether paragraph 6 of the plaint correctly interprets the agreement between the parties.  
(This issue was not argued before me and can be ignored.)
2. Whether the destruction of the vehicle relieved the parties from their obligations under the agreement.
3. Whether the first defendant failed to maintain the vehicle in proper repair in breach of the agreement.
4. Whether the termination of the hiring by the plaintiff was unlawful.
5. Whether the plaintiff has suffered any and if so what loss.

As will be seen, there was no substantial issue of fact between the parties. In particular, it was not suggested that the loss of the vehicle was attributable to any wrongful act or omission of the defendant, or that the vehicle had not been properly maintained prior to the accident in which it was lost.

Counsel for the defendant submitted that the defendant was not in breach of clause (5) of the terms of the agreement (to which I shall refer as "the terms"), which provided that the defendant should "maintain the goods in proper repair and in good and serviceable condition (making good all damage thereto whether or not occasioned by his own act or default)" and which, he argued, did not impose an absolute liability. But he submitted that over and above the terms of the agreement, there is the common law principle that where the subject-matter of a contract is destroyed, the parties are discharged from their obligations.

Counsel for the defendant based his main argument on two propositions: first, that there had been a failure of consideration and, secondly, that there was impossibility of performance. As regards the first, he argued that the consideration for the contract was, on the one hand, that the plaintiff company received the amount of the hire and, on the other, that the defendant had the use of the vehicle; with the destruction of the vehicle, the consideration failed and consequently the contract came to an end. As regards the second, he argued that the performance of the contract depended on the continued existence of the vehicle.

Under the general law of bailment, the duty on the defendant was only to take reasonable care.

I do not propose to deal in detail with the authorities cited to me, because, with respect, I do not think they advance the matter at all. They all relate to cases where the contract was silent as to the consequences of such a happening as occurred. But I do not think that any of the principles on which the defendant relies can be invoked where the terms of the contract expressly provide for the eventuality. If any authority is needed for this proposition, it is to be found in the words of Viscount Haldane in *Bank Line, Ltd. v. Arthur Capel & Co.* (1) ([1919] A.C., at p. 445) where he said:

“What is clear is that where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control the owner is not bound unless it is quite plain that he has contracted to be so.”

Mutatis mutandis, that applies here.

Again, if I may quote from an author happily (so far as I am aware) alive, McElroy in his *Impossibility of Performance*, says at pp. 242–243:

“If the parties not merely contemplated the possibility of the event but, with the possibility of the event in mind, expressly or impliedly agreed that its occurrence should not affect the contractual obligation, then obviously their intention prevails.”

In the present case, the agreement expressly provided for just such an event as actually happened. Clause (3) of the terms provided that the defendant should forthwith at his own expense insure the vehicle “against all the usual risks including loss or damage by . . . accident” and clause (4) provides that in the event of the loss of or serious damage to the vehicle the defendant would assign his rights under the policy to the plaintiff company, which should, in any event, receive all moneys payable under the policy, other than moneys payable to repairers. The paragraph continues:

“If the owner shall at any time agree to any modification or restriction in the insurance cover herein provided for, or if for any other reason the goods shall not be fully covered by insurance, the hirer shall indemnify the owner against any loss which the owner may sustain as a consequence.”

It has not been suggested at any stage of the proceedings that the accident which occurred was not one which would be covered by an ordinary comprehensive policy.

It follows that it is not, in my opinion, open to the defendant to plead either failure of consideration or impossibility of performance. That disposes of the second issue.

As regards the third issue, I am not satisfied that clause (5) of the terms is relevant in the circumstances. It imposed a duty on the defendant to keep the vehicle in good and serviceable condition and to make good all damage. There is no mention of replacement in the event of loss. Since clause (4) expressly provides for the event of the loss of the vehicle, while clause (5) does not, I do not consider that the latter should be read as including by implication any such provision. The two clauses must be read together.

The fourth issue was not expressly argued. It is not disputed that the defendant failed to pay the instalments which fell due after the destruction of the vehicle, or that the advocates for the plaintiff company served formal notice of the termination of the hiring in accordance with clause (8) of the terms, which

provides for such termination on failure to pay any instalment within a period of ten days. The defendant's refusal to pay instalments was based on his claim that the destruction of the vehicle had relieved him from liability. Since I have held against him on that issue, it follows that I must, and I do, find that the termination of the hiring was lawful.

The fifth issue concerns the quantum of damages and this also was not argued. I must, however, be satisfied that the amount claimed is proper. That is, I think, the general rule: in *Mayne and McGregor on Damages* (12th Edn.), at p. 825, it is said:

"Even if the defendant fails to deny the allegations of damage or suffers default, the plaintiff must still prove his loss."

Furthermore, in the present case the sum claimed by the plaintiff company includes an amount calculated under the depreciation provision in clause (11) of the terms, which reads as follows:

"(11) Should the hiring be terminated by the hirer under clause 10 or by the owner under clause 8 hereof the hirer shall forthwith pay to the owner either (a) such further sum as with the total amount of any instalments previously paid hereunder will equal two-thirds of the total hiring cost shown in the schedule as agreed compensation for the depreciation of the goods or (b) the amount of all instalments and other moneys then already due hereunder, whichever is the greater."

There is ample authority for saying that the "agreed compensation" under clause 11 (a) amounts to a penalty – it is enough to refer to *Financings Ltd. v. Baldock* (2). Section 74 of the Law of Contract Ordinance, 1961 (No. 1 of 1961), therefore applies and, while I can award compensation, it must be reasonable and it must not exceed the amount of the penalty stipulated for.

The plaintiff company is claiming a sum of Shs. 28,705/05 as being contractually due. This sum was arrived at by adding the amount of the instalments due at the termination of the agreement, a figure for interest and a figure for depreciation, and deducting from the result a sum of Shs. 5,294/95 which the plaintiff company is waiving. I find myself unable to understand how any of these figures are arrived at. The arrears of hire instalments are shown as Shs. 13,225/–, although it appears that only six instalments of Shs. 1,916/67 each were due, that is Shs. 11,500/02. The figure for interest appears to include interest on instalments for periods when they had not become due. The figure for depreciation does not make allowance for the initial instalment of rent, although I can see nothing in the terms to justify its exclusion. Finally, and most serious, I cannot see the justification for aggregating the unpaid instalments and the figure for depreciation: they are clearly alternative in clause (11).

It appears to me that under clause (11) of the terms the most that could be payable to the plaintiff company is the greater of two amounts: the one is the amount of the instalments due and unpaid at the date of the termination of the agreement, that is, six instalments of Shs. 1,916/67 each, Shs. 11,500/02, plus interest at 10 per cent. from the date when each instalment fell due until the date when the suit was filed, that is, July 21, 1962, Shs. 401/22; a total of Shs. 11,901/24; the other is two thirds of the total hiring cost, Shs. 51,000/06, that is, Shs. 34,000/04, less the instalments paid, Shs. 22,250/01; leaving Shs. 11,750/03.

But for the limitation imposed by s. 74, the reasonable compensation would, on the basis of the contract having been repudiated by the defendant (and relying particularly on the authority of *Yeoman Credit Ltd. v. Waragowski* (3)), have included the unpaid instalments that had not fallen due at the date of

termination (there is no question in this case of any deduction for accelerated receipt) and would consequently, even after deduction of the Shs. 13,000/- received from the insurers, have been in excess of the amount, Shs. 11,901/24, mentioned above, which is the limit of the compensation that can be awarded.

I should perhaps add that the plaintiff company might have been able to recover in full had it relied on the indemnity provision contained in clause (4) of the terms, but that is a matter which I cannot consider, since it was neither pleaded nor argued before me. Counsel for the plaintiff did, at a fairly late stage, seek leave, which I refused, to amend the plaint to allege a *breach* of clause (4), but that is a very different matter from pleading the positive agreement to indemnify.

The answers to the issues are accordingly as follows:

2. The destruction of the vehicle did not relieve the parties from their obligations under the agreement.
3. The first defendant did not fail to maintain the vehicle in proper repair in breach of the agreement.
4. The termination of the agreement was lawful.
5. The plaintiff company has suffered loss and is entitled to recover damages, but those damages are limited to Shs. 11,901/24.

I give judgment accordingly for the plaintiff company for compensation of Shs. 11,901/24, interest at the court rate from the date of filing suit, and costs.

*Judgment for the plaintiff accordingly.*

For the plaintiff company:

*MS Shukla*

*MS Shukla, Dar-es-Salaam*

For the first defendant:

*Baloo N Patel*

*Balvo Patel & Co, Dar-es-Salaam*

## **H J Stanley & Sons Ltd v Said Nasoor Zahor**

**[1963] 1 EA 564 (HCT)**

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 24 September 1963                         |
| <b>Case Number:</b>      | 112/1962                                  |
| <b>Before:</b>           | Graham Reide J                            |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Pleading – Limitation of action – Exemption from limitation – Exemption claimed on ground of*

*mutual open and current account – Ground of exemption not pleaded.*

*[2] Limitation of action – Action founded on account stated – Account stated orally – Period of limitation applicable – Indian Limitation Act, 1908, First Schedule, arts. 64 and 115.*

### **Editor's Summary**

The plaintiff sued the defendant for Shs. 45,896/19 as the balance found due by the defendant on accounts stated orally on or about December 30, 1960, or, alternatively, as the balance of the price of goods sold and delivered and damages for breach of contract. The plaintiff averred that the defendant by letter dated August 1, 1961, had admitted the claim and hence the claim was not time barred. The defendant denied that the letter was an acknowledgment of liability within s. 19 of the Indian Limitation Act, 1908, and took a preliminary objection that the action was time barred. The plaintiff submitted that the action was not time barred on three grounds, namely, that there was an acknowledgment of

liability under s. 19, that the action was founded on accounts stated under art. 64 and that the action was in respect of a mutual, open and current account under art. 85 in the First Schedule of the Act.

**Held –**

- (i) as there was no averment in the plaint that the action was in respect of a mutual open and current account, the plaintiff company was debarred from alleging the existence of such an account, and accordingly art. 85 was not applicable;
- (ii) in the defendant's letter of August 1, 1961, there was no admission of indebtedness either for the amount claimed by the plaintiff in his letter of demand or of any sum whatsoever; the letter could not be construed as anything more than an acknowledgement that there had been a course of trading between the parties; accordingly s. 19 of the Indian Limitation Act was not applicable;
- (iii) where accounts have not been stated in writing and signed, art. 64 is not applicable. *Dukhi Sahu v. Mohamed Bikhu* (8) applied;
- (iv) an oral adjustment of accounts gives rise to a cause of action and an action on the oral adjustment is governed by art. 115 of the First Schedule to the Indian Limitation Act, 1908. *Jalim Singh v. Choonee Lal* (9) applied;
- (v) the plaintiff was entitled to invoke art. 115 as furnishing a cause of action in this suit and accordingly the action was not *prima facie* time barred.

Preliminary objection overruled.

**Cases referred to in judgment:**

- (1) *H. J. Stanley & Sons Ltd. v. Chhaganlal Bhimji* (1962), Tanganyika High Court Civil Case No. 111 of 1962 (unreported).
- (2) *H. J. Stanley & Sons Ltd. v. Gulamhussein Rawji & Co.* (1962), Tanganyika High Court Civil Case No. 125 of 1962 (unreported).
- (3) *Ismail's Stores Ltd. v. M. A. Lone* (1959), Tanganyika High Court Civil Appeal No. 38 of 1959 (unreported).
- (4) *Clayton's Case* (1816), 1 Mer. 529.
- (5) *Jogeshwar Roy v. Raj Narain Mitter* (1903), 31 Cal. 195.
- (6) *Md. Abdullah Khan v. Ford & MacDonald Co. Ltd.*, [1930] A.I.R. All. 124.
- (7) *Sheikh Akbar v. Sheikh Khan* (1881), 7 Cal. 256.
- (8) *Dukhi Sahu v. Mohamed Bikhu* (1884), 10 Cal. 284.
- (9) *Jalim Singh v. Choonee Lal*, 11 I.C. 540.

**Judgment**

**Graham Reide J:** In this suit the plaintiff company sues a merchant for Shs. 45,896/19 claimed as the balance found to be due from him on accounts stated orally on or about December 30, 1960, and in

accordance with particulars annexed to the plaint (as Annexure “A”), in which are set out a great number of transactions, indicative of trading between the parties and including advances, credit notes, invoices and payments, between the end of January, 1952 and December 31, 1960. Alternatively, the plaintiff claims Shs. 32,414/- being the balance of price of goods sold and delivered in accordance with the particulars in Annexure “A”, together with Shs. 4,675/60 damages arising from breach of contract, and Shs. 8,806/50 for “damages or customary interest”. The total of these three sums is Shs. 45,896/-.

Paragraph 7 of the plaint avers that the defendant, by a letter (Annexure “B”) “admitted the claim”, and “hence the plaintiff’s claim is not time barred”.

The defendant has denied in his written statement of defence that the letter constitutes an acknowledgment of liability within the meaning of s. 19 of the Indian Limitation Act, 1908, and pleads that the suit is time barred. The question whether, on consideration of the plaint as it stands, that is so, has been raised as a preliminary point. Counsel for the plaintiff has submitted argument that it is not so barred, under three heads, arising out of arts. 85 and 64, and s. 19 of the Limitation Act. The latter two heads are pleaded or adverted to in the plaint. That arising out of art. 85 is not, and it will be convenient to deal with this first. The article reads as follows:

| “Description of Suit   | Period of Limitation | Time from which period begins to run  |
|--|----------------------|---|
| For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties. | Three years          | The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account”. |

The plaint was filed on July 13, 1962. Counsel for the plaintiff submits, and I think it may well be the case, that Annexure “A” indicates that during the period to which it relates, there was a “mutual, open and current account” between the parties. If the provisions of the article can now be invoked, there are items in the Annexure for dates in 1960 on which the plaintiff might rely. However, O. 7, r. 6 of the Indian Civil Procedure Rules provides that:

“Where the suit is instituted after the expiration of the period prescribed by the Law of Limitation the plaintiff shall show the ground upon which exemption from such law is claimed.”

The learned editor of Mulla on Indian Code of Civil Procedure (10th Edn.), comments on this at p. 558:

“A plaint should not be rejected merely because the exemption is not claimed specifically. All that the rule requires is that the plaintiff shall show the grounds of exemption . . . The High Court of Bombay has held that when a plaintiff does satisfy the requirements of this rule by stating what is in his opinion the ground upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another and not inconsistent ground, should he be later advised that the latter is the true ground. According to the Calcutta and Lahore rulings a plaintiff who has stated one ground of exemption may be allowed to take another and inconsistent ground. The Madras High Court agrees, but in order to do so the plaintiff must obtain the leave of the court to amend his plaint.”

Order 8, r. 2 reads as follows:

“The defendant must raise by his pleading all matters which show the suit not to be maintainable . . . and all such grounds of defence as . . . for instance . . . limitation . . .”

The question which arises on this head of counsel for the plaintiff’s submission is accordingly whether, since the provisions of art. 85 have not been pleaded, the plaintiff may now set them up.

There have recently been before this court two other cases very similar to the present one, in which the same plaintiff, represented by the same advocate, has sued other merchants and where substantially the same questions as to limitation have been argued as preliminary points. The first of these cases is



*H. J. Stanley & Sons Ltd. v. Chhaganlal Bhimji* (1) (Civil Case No. 111 of 1962), and the second, *H. J. Stanley & Sons Ltd. v. Gulamhussein Rawji & Co.* (2) (Civil Case No. 125 of 1962). These very recent cases (to which I will refer in this decision by their numbers) are not yet reported, but I have had the great advantage of perusing the judgments. Before advertent further to them, I should like to refer to the observations of the learned editor of Chitaley and Rao's Indian Limitation Act (1938 Edn.), in commenting on art. 85, at p. 1369:

"An open account means an account which has not been closed by settlement or otherwise; that is, where the balance is not extended or, though ascertained, has not been admitted or acknowledged by the parties. Thus, even if the dealings between the parties may have stopped an account may be open so long as there has been no adjustment or settlement between them. But a current account means an unclosed account where the parties contemplate the continuance in the future of the dealings between them . . . For the application of this article the plaintiff has to show that the account between the parties is open and current and that it was so at the time of the institution of the suit. Where, therefore, the balance due from the defendant has been ascertained and the account is acknowledged by the defendant, the account becomes closed; i.e. becomes an account stated."

In Civil Case No. 111 of 1962, Law, J., dealing with a plaint worded very similarly to the present one, had this to say:

"I agree . . . that where a claim is based on a mutual open and current account, that allegation should be specifically pleaded, especially as in this case the plaintiff company's claim, in para. 3 of the plaint, is based on the allegation that an account was orally stated between the parties on December 31, 1960. The account itself shows that no dealings between the parties took place after December 23, 1960. This indicates to my mind that the account may have been closed at the end of 1960, in which case it was no longer an open and current account at the date of the filing of the suit. But this would not prevent the plaintiff company from basing its claim in the alternative, on an allegation that the account between the parties was open and current, in the event of failing to establish the agreement of a statement of accounts, and this is what the plaintiff company may have tried to do in para. 4. The question is – has the plaintiff company succeeded in doing so?"

The learned judge then sets out the relevant part of the plaint. Its wording is almost identical (except for the figures) with that of the plaint in the instant case. He continues:

"In none of those paragraphs or anywhere else in the plaint is it pleaded that the cause of action is based on a mutual, current and open account. On the contrary, para. 3 specifically refers to the accounts between the parties as having been orally stated, and in para. 7 the plaintiff company specifically relies on an alleged acknowledgment as extending limitation . . . It is open to a party to rely on inconsistent pleas, but the facts supporting these pleas must be distinctly and specifically pleaded, or must be read into the plaint from necessary implication.

On a reading of the plaint and annexures in this suit as a whole, an account stated is pleaded in para. 3 and an acknowledgment in para. 7. The account annexed to the plaint appears to have been closed, at the latest, in December, 1960. In these circumstances, I hold that it cannot

be implied from the context of the plaint and annexures that the plaintiff company intended to rely on a mutual, open and current account, in existence at the date of filing the suit . . . as a cause of action to support the claims in paras. 4, 5 and 6 of the plaint.”

It is trite law that pleadings may be mutually inconsistent and yet valid (see, e.g. Mogha’s Law of Pleadings (5th Edn.), p. 66), but the situation that arises in the present case is that the submission that art. 85 affords a defence to the defendant’s averment that the suit is time barred, is not only inconsistent, as I think, with the averment that the suit is also saved by the provisions of art. 64, but is a matter that has never been pleaded at all. The account, like that in Civil Case No. 111 of 1962, appears to have been closed in December, 1960. Accordingly, I respectfully adopt the reasoning of Law, J., and find that the plaintiff company is now debarred from alleging the existence of a mutual, open and current account.

In Civil Case No. 125 of 1962, where the plaint was again couched in almost identical terms (except for the figures concerned) as that in this case, Biron, J., said:

“This defence is certainly inconsistent with the first defence (sc. under article 64). In fact, the two defences are mutually exclusive . . . Although the statements annexed to the plaint in themselves, assuming that no balance has been struck, are consistent with the transactions between the parties having been conducted on a mutual, open and current account, not only is there no mention of such in the pleadings, but the claims as pleaded, under three separate heads, would appear to exclude that the business and transactions between the parties was so conducted. Further, if the claim was based on a mutual, open and current account, time would not begin to run until as from the last item. Yet, in order to bring the claim within the limitation period, the plaintiff has expressly pleaded in paragraph seven of his plaint, that the claim is not time barred because the claim has been expressly admitted in writing by the defendant. The acknowledgment, to prevent the claim being time barred, is not pleaded in the alternative. Although as held in *Pushpa d/o Raojibhai M. Patel v. The Fleet Transport Co. Ltd.* (1960) E.A. 1025, a party may not be rigidly bound by his pleadings and, taking the broadest possible view of the pleadings, I find it impossible to hold on the pleadings as such, that the plaint discloses a claim under a mutual, open and current account. I do not, however, propose to decide this substantive issue at this stage.”

These observations are of course obiter only, but indicate that the learned judge followed the same line of reasoning as Law, J., and that which I have myself adopted in the instant case.

Counsel for the plaintiff (Mr. Kesaria) has submitted further, and it is convenient to deal with his submission under this head, that even if I find, as I have done, that he is debarred from pleading that this account is a “mutual, open and current account”, yet nevertheless it is what is known as a “running account” in the sense in which that term is commonly used and in which it was employed by Crawshaw, Ag. C.J. (as he then was) in *Ismail’s Stores Ltd. v. M. A. Lone* (3), and in which he himself appeared. In that case the learned judge said:

“There is another reason why I consider the claim is not time-barred. The account between the parties was, in my opinion (although Mr. Kesaria does not agree with me), what is commonly called a ‘running

account', and as the headnote to the *Kedar Nath* case says, 'Where the dealings between two parties give rise to a continuous account the whole forms one cause of action', not, as Mr. Kesaria would have it, a separate cause in respect of each item. In such cases it is I think well recognized that unless there is some stipulation or intention to the contrary, payments are regarded as allocated to the debts in the order in which they have arisen."

It appears from Annexure "A" to the plaint that there was on July 13, 1959 (that is three years before the filing of the plaint) a balance owing to the plaintiff of Shs. 34,053/67 and that after that date there are credit items in the account totalling about Shs. 7000/- odd.

I have not yet heard argument whether the account in this case was a "running account" for the purposes of this suit, but if that were so then it would appear that this latter sum would be appropriated to debts under the rule in *Clayton's Case* (4) and so, in accordance with the decision in *Ismail's Stores Limited's* case (3), revive debts for the purpose of the Limitation Act which might otherwise be time barred. That is however a matter which does not fall to be decided at this stage.

I now turn to the plaintiff's submission under s. 19 of the Limitation Act, which provides that:

"Where, before the expiration of the period prescribed for a suit, an acknowledgment of liability has been made in writing signed by the party against whom a right is claimed, a fresh period of limitation shall be computed from the time of the signing of the acknowledgment."

The letter on which the plaintiff relies is dated August 7, 1961, and is addressed by the defendant to the plaintiff. It reads as follows:

"Dear Sir:

Thank you very much for your notice dated 1/8/61 of Messrs. H. J. Stanley.

The amount which you have shown in your notice is not correct at all. I hope when after two months' time, I shall come myself to D.S.M. to discuss the matter with you. I request you to hold this notice till I come to D.S.M. Nothing more to add – awaiting your favourable reply."

The question whether this letter constitutes an acknowledgment within the meaning of s. 19 is one about which the learned advocates on each side have referred me to a great number of Indian cases and authorities. I hope I may be forgiven if I do not deal with them all in this judgment. I have considered them and the arguments based upon them which the learned advocates have submitted, and am satisfied that the letter in this case is not an acknowledgment within the section. The learned editor of Rustomji on Indian Limitation Act (5th Edn.), says at p. 303:

"*Acknowledgment of merely part of debt*: In case of a debt there must be a clear and unambiguous recognition of an existing debt or a part of it, or of a subsisting relationship of debtor and creditor. If some debt is acknowledged it is immaterial that the correctness of the amount claimed is disputed in the acknowledgment. An acknowledgment that some money is due is sufficient to take the case out of the statute as to all that is due. The acknowledgment may be sufficient though it omits to specify the

nature of the right, but there must be a definite acknowledgment. The acknowledgment need not be expressed but it must be made under circumstances from which the court can infer that the liability was subsisting at the time of the acknowledgment.”

The learned editor of Chitaley and Rao (1938 Edn.), has this to say at p. 669:

*“Acknowledgments of liability with reference to portion of claim made by the plaintiff effect:* The section will only apply to a case if it is shown that the acknowledgment of liability relied on relates to the right claimed in the suit. Hence, where an acknowledgment of liability is made only with reference to a portion of the claim put forward by the plaintiff, such acknowledgment will save limitation only with regard to such portion and not with regard to the entire claim of the plaintiff.”

At p. 650 of the same work it is said:

“An acknowledgment of liability necessarily implies a *knowledge* on the part of the person alleged to make the acknowledgment that he is admitting something . . . Hence, in considering whether certain words amount to an acknowledgment of liability it must be seen whether at the time of writing them the writer had in his mind the question as to his liability . . . it is clear that whether a document contains an acknowledgment of liability depends purely on the terms of the document and their construction by the court. Where on a reasonable construction of a document it contains an express or implied admission by the author of the document of a subsisting liability the document will operate as an acknowledgment of liability under this section. Where the document does not contain such an admission it will not amount to an acknowledgment under the section.”

Proceeding on these principles I find the case of *Jogeshwar Roy v. Raj Narain Mitter* (5) very much in point. In that case (I quote from the headnote) in reply to a letter enclosing a bill for work done the defendant wrote:

“The bill glanced over is incorrect; large amounts have been wrongly deducted. I will first have the work examined, though I know that the whole of the work is not yet finished; then I will examine the estimates and after deducting what has to be deducted I will see what is due.”

It was held that the writing was not an acknowledgment of liability within the meaning of s. 19. The terms of the letter in that case are strikingly similar to those of the letter in the instant case. Counsel for the plaintiff has cited *inter alia* the case of *Md. Abdullah Khan v. Ford and MacDonald Co. Ltd.* (6), where it was held:

“If from the letter it appears that an inevitable deduction from the admission is that the party against whom the money is claimed acknowledged his liability to pay his debts if the balance should be ascertained to be against him, the statement is sufficient acknowledgment. Even where it is doubtful on which side the balance would lie the statement is sufficient acknowledgment within the meaning of s. 19.”

That decision is not, however, on all fours with the present case since there is here no acknowledgment of “liability to pay debts if the balance should be ascertained to be against” the defendant. The defendant’s letter, to my mind, cannot fairly be construed as anything more than an acknowledgment that there has been a course of trading between the parties. I am unable to infer any admission of indebtedness either for the amount claimed by the plaintiff in his notice to which the letter is a reply, or of any sum whatsoever.

I now turn to the third head of submission, that is, that arising under art. 64, which reads as follows:

| “Description of Suit  | Period of Limitation | Time from which period begins to run  |
|---|----------------------|---|
| For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. | Three years          | When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.” |

The relative paragraph of the plaint reads as follows:

- “3. The plaintiff’s claim is for Shs. 45,896/19 being the balance found to be due from the defendant to the plaintiff on accounts stated between them orally on or about December 30, 1960. The particulars of the said claim of the plaintiff are given in the Annexure “A” annexed with the plaint.”

As Biron, J., said in Civil Case No. 125 of 1962, cases on the interpretation of art. 64 “are almost legion, and as is not so unusual in Indian cases from the different courts, they are conflicting”. A large number of authorities has been cited before me by the learned advocates on either side in this case, and like Biron, J., I must ask to be forgiven for not dealing with all of them expressly.

Counsel for the defendant observed initially that “the whole purpose of having something in writing is to stop mischief between the parties, because it is much easier to say that a certain thing was done orally . . . [If] it is only word of mouth . . . the parties can come and say that it was stated orally on such and such a date in spite of the fact that even after that date the account has been challenged by the defendant”. Such observations may be relevant to the question of cogency of evidence of an account stated orally, but are not so to the present submission, which is concerned only with consideration of the plaint as it stands.

Counsel for the defendant submits that art. 64 does not apply where accounts have not been stated in writing, and I think he is right. The article is concerned with limitation of suits. It defines in the first column the description of the suit with which it deals, prescribes the period of limitation in the second column and in the third column the time from which that period begins to run when the accounts stated are in writing. It appears to me that unless the words “in writing” are to be ignored, orally stated accounts are necessarily excluded from the article. In *Sheikh Akbar v. Sheikh Khan* (7), the court, composed of Garth, C.J. and McDonnell, J., found that (I quote from the headnote):

“The period of limitation for suits on accounts stated is the same whether the accounts are stated verbally or in writing and is governed by Act 15 of 1877, Sched. ii, cl. 64.”

In his judgment in *Sheikh Akbar’s* case (7) Garth, C.J., stated (7 Cal., at p. 256):

“It was ingeniously suggested in argument on behalf of the plaintiff, that as art. 64 of Sched. ii of the Limitation Act says nothing in the third

column as to accounts stated by word of mouth, that article must be considered as applicable only to accounts stated in writing, and that as no special period of limitation is prescribed for suits upon accounts stated orally, the period of limitation for such suits would be six years. It is certainly difficult to understand what the Legislature could have intended by this omission, but we think that, giving a reasonable construction to art. 64, we must consider that the second column means to fix three years as the period of limitation in all suits upon accounts stated. To prescribe a limitation of three years in suits upon accounts stated. To prescribe a limitation of three years in suits upon accounts stated in writing, and six years in suits upon accounts stated orally, would be an obvious absurdity.”

As regards the last sentence of this extract, I would respectfully agree. *Sheikh Akbar's* case (7) has however been overruled.

I will take this opportunity of mentioning that I am under the impression (perhaps wrongly) that counsel for the defendant believed Law, J., to have followed this decision in Civil Case No. 111 of 1962. It is not, however, the fact that the learned judge held in that case, as counsel for the defendant appears to think, that “art. 64 applied whether or not the accounts are stated in writing”. What he said about art. 64 was that “it does not deal with nor does it exclude an oral statement of accounts”, an observation with which I respectfully agree. The learned editor of Rustomji's *The Law of Limitation* (5th Edn.), at p. 776, has this to say about *Sheikh Akbar's* case (7):

“This decision . . . lays down bad law and has been overruled as it is clear that the article applies only when the account is stated in writing and signed, vide column third of art. 64.”

The authority for the statement of the law, and the case upon which counsel for the defendant principally relies, is *Dukhi Sahu v. Mohamed Bikhu* (8), where a full bench of five judges, including Garth, C.J. and McDonell, J. (the judges in *Sheikh Akbar's* case) found that “the statement of account not being signed by the defendant it did not fall within the terms of art. 64”; though it is to be observed that Garth, C.J., did not personally adopt this view, since he held that that question was not before the court. In Chitale and Rao (1942 Edn.), at p. 1398, it is stated quite simply that “where an account stated is not signed as required by this article by the defendant or his agent this article will not apply”.

The remaining question under this head is whether there is any article other than art. 64 under which an oral statement of accounts will furnish a cause of action. A perusal of note 8 on art. 64 at p. 1396 of Chitale and Rao reveals great divergence of opinion between the Indian authorities. In *Jalim Singh v. Choonee Lal* (9), of which unfortunately no report is available here, it was held that an oral adjustment gives rise to a cause of action and that a suit on the oral adjustment would be governed by art. 115 or by art. 120 of the Act. In considering this decision and that in *Sheikh Akbar's* case (7), the learned authors of Chitale observe that “it is submitted that the view of Jenkins, C.J., in *Jalim Singh's* case (9) must be preferred in principle”, a view with which, for reasons I have already set out, I respectfully agree, though only insofar as art. 115 is concerned. To permit a plaintiff to rely on art. 120 would result in what Garth, C.J., rightly described in *Sheikh Akbar's* case (7) as the “obvious absurdity” of prescribing a limitation of three years in suits upon accounts stated in writing, and six years in suits upon accounts stated orally. I am fortified in my view by the two recent rulings in this court to which I have already referred. In Civil Case No. 111 of 1962, Law, J., expressed agreement with the learned authors of Chitale that the view of Jenkins, C.J., in *Jalim's*

case (9), should be preferred; and in Civil Case No. 125 of 1962 Biron, J., found that the predominant view was in favour of the proposition that an oral statement of account will give rise to a cause of action.

I find that the plaintiff may invoke art. 115 as furnishing a cause of action in this suit, which is accordingly not *prima facie* time barred.

*Preliminary objection overruled.*

For the plaintiff:

*RC Kesaria*

*RC Kesaria, Dar-es-Salaam*

For the defendant:

*NA Velji*

*Sayani & Co, Dar-es-Salaam*

**A M Dharas and Sons Ltd v Elys Ltd**  
[1963] 1 EA 573 (HCU)

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|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 27 November 1963                |
| <b>Case Number:</b>      | 882/1961                        |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Landlord and tenant – Letting of shop and store for fixed term – Vacant possession of shop given – Vacant possession of store not given – Premises vacated by tenant before term expired – Action by landlord for damages for breach of tenancy agreement – Whether action maintainable.*

**Editor's Summary**

The plaintiffs agreed to let a shop and a basement store to the defendants for ten months commencing March 1, 1961, and the defendants duly took possession subject to a condition mutually agreed with the plaintiffs whereby the plaintiffs would continue to occupy and use the store until March 31. When April came the plaintiffs refused to give vacant possession of the store and the defendants vacated the premises on July 31. Subsequently the plaintiffs sued the defendants claiming Shs. 3,500/- damages for breach of the tenancy agreement. In the plaint the damages were expressed as rent for the unexpired of the tenancy. The defendants denied liability and counterclaimed Shs. 800/- as the proportion of the rent paid by them attributable to the store. They submitted that the action was not maintainable, that it was the plaintiffs who had committed a breach of the tenancy agreement by failing to give vacant possession of the whole

premises demised and in consequence the defendants were entitled to repudiate and to treat the contract as at an end, and to vacate the premises as they did.

**Held –**

- (i) the plaintiffs, by wilfully refusing to give vacant possession of the store to the defendants after April 1, had committed a breach of the tenancy agreement and the action to recover the rent reserved by the tenancy agreement was not maintainable in law;
- (ii) since the defendants had failed to call evidence as to the proportion of the rent paid which should be refunded to them, the counterclaim would also be dismissed.

Action and counterclaim both dismissed.

**Cases referred to in judgment:**

- (1) *Markham v. Paget*, [1908] 1 Ch. 697.
- (2) *Coe v. Clay* (1829), 5 Bing. 440; 130 E.R. 1131.
- (3) *Jinks v. Edwards* (1856), 11 Ex. 775; 156 E.R. 1045.



- (4) *Holgate & Others v. Kay* (1844), 1 Car. & Kir. 341.
- (5) *Neale v. Mackenzie* (1836), 1 M. & W. 747; 150 E.R. 635.
- (6) *Gardiner v. Williamson* (1831), 2 B. and Ad. 336.
- (7) *Smith v. Malings* (1608), Cro. Jac. 160.
- (8) *Salts v. Battersby*, [1910] 2 K.B. 155.

## Judgement

**Udo Udoma CJ:** The plaintiffs in this case, a limited liability company, have claimed against the defendants, also a limited liability company, the sum of Shs. 3,500/- as damages for a breach of contract of tenancy, and interest on the said amount. The defendants have denied liability and at the same time counterclaimed against the plaintiffs the sum of Shs. 800/- as a refund of the proportionate rent paid by them in respect of the premises in dispute.

The case of the plaintiffs is that by a series of correspondence, admitted by consent and exhibited in these proceedings and marked Exs. A, A1, A2, A3 and A4, the plaintiff company had agreed to let and the defendants to take as tenants thereof, “upon the terms and conditions normally implied under a tenancy agreement”, their premises comprising a shop and a basement store situate and being at and known as shop No. 2, plot No. 21 Salisbury Road, Kampala, for a fixed period of 10 months commencing from March 1, 1961 to December 31, 1961, at the monthly rental of Shs. 700/- payable in advance.

On March 1, 1961, in pursuance of the said agreement and in furtherance thereof, the defendants were let into the premises and took possession thereof, subject to the condition mutually agreed by and between the plaintiffs and the defendants, that the plaintiffs continue in occupation and use of the store thereof only for a period of one or two months thereafter for the purpose of clearing their trade goods therefrom. Thereafter the defendants were to take full and vacant possession of the said store.

It is the plaintiffs’ case that it was necessary for them to continue in occupation of the said store, which they did with the consent and approval of the defendants, because, prior to the letting of the whole of the premises, including the store to the defendants, the plaintiffs were themselves in occupation of the whole of the premises and had therein carried on their trading business. When therefore the plaintiffs agreed to let and the defendants to take on rent the said premises, it was mutually agreed between the plaintiffs and the defendants, and it was a condition of the letting, that the plaintiffs should only vacate the shop in the first instance and remove their trade goods therefrom into the store at the basement and therein to remain for a period of one or two months for the purpose of disposing of such trade goods therein stored.

The plaintiffs say that in taking possession of the premises in dispute, the defendants had occupied not only the shop but also the store, and that they, it was, who permitted the plaintiffs the use and occupation of a small part – indeed one corner – of the store for the storage of their goods, which then comprised only ten cases of fishing nets, one table, one chair, one safe, one stand and one telephone. The plaintiffs say that within 40 days of the defendants’ occupation of the premises they (the plaintiffs) were able to dispose of their fishing nets.

One month after the defendants had come into occupation of the premises, it is the plaintiffs’ case that they had enquired of the defendants whether they had any objection to their continuing to share the use

and occupation of the store with them. The answer of the defendants to that enquiry had been in the negative. Whereupon the plaintiffs had continued peacefully in the joint use

and occupation of the said store with the defendants. But on June 28, 1961, to their surprise, the plaintiffs say that they received a letter bearing that date, Ex. A.5 from the defendants' solicitors informing them of the defendants' intention to vacate the premises on July 31, 1961.

Prior to the receipt of the letter, Ex. A.5, it is the plaintiffs' case that the defendants had verbally informed them of their decision to quite the premises in dispute because, according to them, there was no business in Salisbury Road, and for that reason they had secured another premises elsewhere for the purpose of their business.

It is the plaintiffs' case that on receiving the letter, Ex. A.5, they had pleaded to no avail with the defendants not to vacate the premises in question as they were prepared themselves to give up the use and occupation of that part of the store occupied by them. In reply to the letter, Ex. A.5, their solicitors, on their instructions, had addressed the letter, Ex. A.6, to the plaintiffs. Thereafter the defendants, who previously had paid their rent regularly in terms of the agreement between them, suddenly withheld the payment of their rent for the months of June and July, 1961. It then became necessary for the plaintiffs to levy distress for the recovery of the rent in arrear, which they did.

Then on July 31, 1961, the plaintiffs received a letter, Ex. A.7, in which were enclosed the keys of the premises. In that letter, the defendants' solicitors had informed them that the defendants had already vacated the premises. The plaintiffs say that thereafter and after a series of correspondence, on their instructions, their solicitor addressed a letter, Ex. A.11, to the defendants notifying them of their breach of the agreement of tenancy and demanding therefor payment of rent in arrear and damages, and intimating to them their intention to institute action against the defendants in default. There followed a letter, Ex. A.12, from the defendants' solicitor counter-charging the plaintiffs with a breach of contract in refusing to give them vacant possession of the premises the subject-matter of the tenancy. Whereupon this action has resulted.

In their defence the defendants, as already observed, have denied liability. They say, contrary to the case of the plaintiffs, that it was the plaintiffs who had committed a breach of their tenancy agreement. The defendants have admitted that there was a contract of letting contained in a series of correspondence between the plaintiffs and the defendants whereby the plaintiffs had agreed to let and the defendants to take the premises, the subject-matter of this action, for a period of ten months at a monthly rental of Shs. 700/-, subject to the term and condition that the plaintiffs would deliver up to the defendants vacant possession of the shop only on March 1, 1961, and the store at the basement thereafter on April 1, 1961.

It is the defendants' case that in breach of the said term and condition the plaintiffs deliberately refused to deliver up to the defendants vacant possession of the said store on April 1, 1961, and even up to July 31, 1961, when they were compelled by the conduct of the plaintiffs to vacate the premises. The defendants say that they had agreed to, and did, by their subsidiary, Uganda Pharmaceutical (Wholesale), Ltd., enter into possession of the shop on March 1, 1961, on the understanding, which was a condition of the agreement, that vacant possession of the store, which formed an integral part of the premises let to them, would be given to them on April 1, 1961. But that despite their repeated demands for the store the plaintiffs had stoutly refused to put them into possession thereof, and instead had continued to remain in exclusive possession thereof.

The defendants have denied that they at any time made use of the store in question either alone or jointly with the plaintiffs. On the contrary, it is the defendants' case that when the plaintiffs put them into possession of the shop,

they, the plaintiffs, took fine care to see that the only communicating door between the shop and the store in question was securely locked by the plaintiffs, who also had custody of the keys thereof, and that the rear entrance into the store was also locked by the plaintiffs, the keys thereof being also in their possession.

The defendants say that as they were denied the use of the store, it became impossible for them to carry on their business in the premises since, as wholesale dealers in poisonous drugs they had nowhere in which to store their large quantities of poisonous drugs. They had refused to pay the rent of the premises for the months of June and July, 1961, in protest against the refusal of the plaintiffs to deliver up to them vacant possession of the store on April 1, 1961, and also as a means of inducing the plaintiffs to fulfil their obligation under the agreement of tenancy as the store was essential to their business. In consequence of that refusal, the plaintiffs, undeterred, had proceeded to levy distress against them for the arrears of rent. As a result they were compelled to pay the rent due on the premises, vacant possession of which had not been given to them, and which rent they had paid under protest.

It is the defendants' case, that since they were only occupying a part of the premises agreed to be let to them, they were not liable to pay the rent of the whole of the premises. On their instructions, therefore, their solicitors had addressed a letter, Ex. A.12, to the plaintiffs demanding a refund of a proportion of the rent already paid by them for four months. As there was no refund forthcoming and the plaintiffs made no effort to put them into possession of the store, they had no alternative but to vacate the premises on July 31, 1961, which they did. They are now also counter-claiming for a refund of the proportion of rent for four months which they had paid to the plaintiffs.

In his address to the court, counsel for the defendants submitted, and counsel for the plaintiffs concurred, that from the evidence three issues have emerged for determination by the court, namely:

1. What were the terms of the contract of tenancy between the plaintiffs and the defendants?
2. Was there any breach of the said contract?
3. If so, by whom?

In framing these questions in this way, the important issues raised in this case appear to have been over-simplified. Counsel, for instance, would appear to have overlooked the counter-claim by the defendants for a refund of a proportion of the rents paid by them to the plaintiffs. I shall however proceed to consider the evidence in the light of these questions.

It is common ground that the series of correspondence Exs. A, A1 to A4, created a contract of letting (hereinafter to be referred to as "the tenancy agreement") between the plaintiffs and the defendants. It is also common ground that even long after the defendants had entered into possession of the shop, which was only a part of the premises let, the plaintiffs still continued in occupation and use of the store at the basement of the shop. The plaintiffs say that they had so continued in the use and occupation of the store with the permission and consent, that is to say, with the leave and licence of the defendants. On the other hand, it is the defendants' case that they were not only never given vacant possession of the store but were completely barred from access thereto and the use thereof by the plaintiffs, who still remained in possession and continued their use and occupation of the same and had custody of the keys of the two entrances to the said store.

Now the question is what were the true terms of the contract of tenancy?

On the evidence it seems clear that the premises known as shop No. 2, plot No. 21 Salisbury Road, Kampala (hereinafter to be referred to as “the premises”), which constituted the subject-matter of the tenancy agreement between the plaintiffs and the defendants comprise a shop and a store attached to and at the basement of the said shop. The store, which in the letters Exs. A, A1 to A3 were referred to as “godown”, had two entrances, one of which was a communicating door opening unto a staircase leading from the shop into the store and the other a door at the rear of the store.

There is no doubt whatsoever in my mind, and I find as a fact on the evidence, that the shop and the store together constituted the premises which the plaintiffs had agreed to let to the defendants and the defendants had agreed to take from the plaintiffs as tenants thereof for a period of ten months, commencing from March 1, 1961 to December 31, 1961, at the monthly rental of Shs. 700/-, subject to the condition that vacant possession of the shop only would be delivered to the defendants in the first instance, and vacant possession of the store to be delivered to the defendants one month after delivery of the shop.

It was necessary for the plaintiffs to retain possession of the store for one month because, as the plaintiffs repeatedly emphasised in their letters, Exs. A, A1 to A3, on delivering possession of the shop the plaintiffs had to remove all their trade goods previously stored therein into the store at the basement and there to be stored until they could find themselves a suitable shop into which to transfer such goods. There has been no evidence before this court that the plaintiffs had in fact subsequently secured such a shop or that, apart from the fishing nets, the other contents of the store were ever removed therefrom.

It is therefore most improbable that the plaintiffs did deliver vacant possession of the store in question to the defendants at all or on March 28, 1961, as they have sworn. By March 28, 1961, the plaintiffs were still within their right to remain in possession of the store, the defendants having entered, I find, into possession of the shop only on March 1, 1961, and the period of one month allowed by the agreement of tenancy would not have expired until about April 1, 1961.

If indeed the plaintiffs had wanted to remain in the store and to share the use thereof with the defendants after delivering vacant possession thereof to the defendants, one wonders why it was necessary for the plaintiffs in the first instance to have insisted in their letters already referred to herein that they be allowed to remain in the store for the period of one month after the defendants had taken possession of the shop.

The evidence of the plaintiffs that one month after the defendants had entered into possession of the shop, they had enquired of the latter whether they had any objection to their continuing in the use and occupation of the store, which enquiry had yielded a negative answer, cannot be true, and I reject it as unreasonable and unworthy of belief. That piece of evidence, I find, is wholly contradictory of the terms of the tenancy agreement proposed and repeatedly insisted upon in the letters, Exs. A, A1 to A3 by the plaintiffs and accepted by the defendants, which were as follows: –

In Exhibit A, letter dated February 17, 1961, the plaintiffs had written:

“Meanwhile we shall be pleased if you will kindly let us know the terms of the lease you are prepared to accept. Also as agreed by you we will keep the godown at least for one month from the date the shop is delivered you vacant as we will have to shift all our goods in godown and find a suitable shop to shift the goods.”

Then in their letter of February 20, 1961, Ex. A1, the plaintiffs wrote:

“The above is subject to that we will give you godown one month after

the delivery of the shop. This is only because we will have to store all our goods in godown and look for the proper shop.”

And again, finally in their letter of February 24, 1961, Ex. A3 the plaintiffs had written:

“This is once again to write you that we will vacate the godown after one month from the date the shop is given to you. This was mutually agreed by you and confirmed when your presence in Kampala fortnight back.”

The only reasonable inference to be drawn, and which I now draw, from the evidence and having regard to Exs. A, A1 and A3, is in terms of the agreement of tenancy that at the time when the defendants were put into vacant possession of the shop, the plaintiffs had made certain that they themselves remained in absolute and exclusive control and possession of the store into which they had removed their trade goods, and that the defendants had accepted that position and thereby confined themselves to the shop, in the honest belief, that at the expiration of one month vacant possession of the store would be delivered to them.

I accept the evidence of the defendants and their witnesses and find as a fact that throughout the period they were in occupation of the shop, the only communicating door between the shop and the store was kept locked up by the plaintiffs; that the defendants, being deliberately kept out of it by the plaintiffs, had no access to the said store; and that after April 1, 1961, when possession of the store ought to have been given, the plaintiffs had wilfully refused to give vacant possession of the said store to the defendants but had themselves continued in possession thereof to the detriment of the defendants. Such conduct on the part of the plaintiffs, I am of opinion, was completely incompatible with the due and diligent performance of their obligations under the terms of the tenancy agreement. I hold that it was in breach thereof.

I also find that despite that default, the plaintiffs had proceeded to levy and had in fact successfully levied distress for, and had recovered from the defendants rent in arrear for the months of June and July, 1961. It was in consequence of the levy of distress, and because the plaintiffs still deliberately refused to give vacant possession of the store to the defendants had to vacate the premises on July 31, 1961, that is to say, before the expiration of the time fixed by the tenancy agreement.

Now, what the court has been called upon to decide is whether this action of the plaintiffs for damages for a breach of the contract of tenancy is maintainable in law. The contract concerned is of course the tenancy agreement between the plaintiffs and the defendants, and the damages are expressed in paragraph 7 of the plaint as “rent for the months of August, 1961 to December, 1961, being unexpired period of tenancy at the rate of Shs. 700/- per month.” In other words this is an action to recover the rent of the premises for the unexpired period of the tenancy.

Counsel for the defendants has submitted that this action is not maintainable on the ground that since it was the plaintiffs who had committed a breach of the tenancy agreement by failing to deliver vacant possession of the whole premises demised, the defendants were entitled to repudiate, and to treat the contract as at an end, and to vacate the premises as they did. They were not under obligation any more to perform their part of the contract.

On the other hand, it was contended for the plaintiffs that, if even the court should find that the plaintiffs had failed to deliver vacant possession of the store to the defendants, since the defendants had been given vacant possession of a

part of the demised premises, they were not entitled to repudiate the contract of tenancy. They were still bound to pay the rent agreed, and could only sue for damages for the breach of contract, because failure on the part of the plaintiffs to deliver possession of only a part of the demised premises could only amount to a breach of the covenant for quiet enjoyment. In support of this submission counsel for the plaintiffs referred the court to a passage in Foa's General Law of Landlord and Tenant (7th Edn.), at p. 157, which states:

"But where the demise under similar circumstances, being made by deed, was capable of passing the reversion (with the rent incident thereto) in the proportion previously granted, it was held that the lessee was liable for the whole rent."

The first objection to this passage is that it is only one half of the proposition set out at p. 157 in paragraph 253 of Foa's General Law of Landlord and Tenant; and secondly the present demise was not made under a deed.

I, however, agree that failure by the plaintiffs to deliver possession of a part of the demised premises, that is, the store to the defendants may be regarded as a breach of the implied covenant for quiet enjoyment, which would entitle the defendants to sue for damages. On the authority of *Markham v. Paget* (1), in the absence of express covenant, as in the instant case, the mere relation of landlord and tenant implies in law a covenant for quiet enjoyment. In the old English case of *Coe v. Clay* (2), it was laid down that he who lets agrees to give possession, and if he fails to do so, the lessee may recover damages against him, and he is not driven to bring an action for ejectment.

In that case the defendant had agreed per verba et praesenti to let the plaintiff certain premises, and the plaintiff, being unable to get possession because a preceding occupier wrongfully refused to quit, had sued the defendant for damages. At the trial, the agreement having been proved, it was argued on behalf of the defendant that the plaintiff had committed no breach of the contract as the agreement amounted to an actual demise of the premises; that the plaintiff had an interest upon which he might have brought an action for ejectment; and that it was no fault of the defendant if a person not claiming under him committed a wrong for which the plaintiff had a distinct remedy by ejectment. Judgment however was entered for the plaintiff, the court holding that he who lets agrees to give possession and not merely to give a chance of a law suit.

In *Jinks v. Edwards* (3), by an agreement in writing the defendants therein agreed to let to the plaintiff certain premises for one year from September 29, 1854 and so from year to year. The plaintiff sued the defendants alleging a failure or refusal by them to give or let the plaintiff into possession on the agreed date or subsequently. The action was opposed by the defendants on the ground that the agreement did not contain any contract on the part of the defendants to give the plaintiff possession of the premises. The principle laid down in *Coe v. Clay* (2) that every person who lets premises impliedly undertakes to give possession of them was challenged as being unsupportable in law. But the court, rejecting the argument, held that the doctrine in *Coe v. Clay* (2), was sound and strictly in point, and thereupon entered judgment for the plaintiff.

In *Holgate and Others v. Kay* (4), it was held that where premises are demised by indenture at an entire rent and there is a covenant by the lessee to pay such rent no action for rent in arrear can be brought on such covenant unless the lessee has been let into full possession of the premises demised.

*Neale v. Mackenzie* (5), was an action for trespass for entering the plaintiff's dwellinghouse and taking his goods. In that action, which was based on wrongful distress, the defendant, who was the

distrainor, had pleaded that he, being seised of the dwellinghouse and certain other premises, had demised the same



to the plaintiff for one year from June 25, 1833 at the rent of £70 payable quarterly; that the plaintiff accepted the lease and by virtue of the demise entered into and upon the demised premises, and thereupon became and yet was possessed thereof for the said term so granted to him; and until December 25, 1833 and from thence until and at the time when, etc. had and enjoyed the dwellinghouse and premises by virtue of the said demise; and that on December 25, 1833, £35 of the rent was in arrear, whereupon the defendant entered and made a distress for the same.

In his reply to these averments, the plaintiff had pleaded that one Adam Charlton, before the demise in the plea mentioned, and from thence and still was in possession of 8 acres of land of the said demised premises under and by virtue of a demise theretofore made by the defendant to him, which demise was then and from thence had been and still was in force and undetermined, whereby the plaintiff had not and could not enter into the possession of, or hold or enjoy the said last mentioned land, so being parcel of the demised premises in the plea mentioned; and although he had been willing and desirous of entering he had been kept out of possession by Adam Charlton by virtue of the demise to him, and the plaintiff had been prevented holding and receiving the profits.

At the trial it was argued for the defendant that the impediment to the plaintiff's obtaining possession of the 8 acres demised to Adam Charlton by the defendant previously to the demise made to the plaintiff was in the nature of an eviction by title paramount since Adam Charlton's right was prior to the demise to the plaintiff and to the title acquired under that demise by the plaintiff and that therefore the rent was apportionable and the distress justified as the person was entitled to distrain for apportionable rent. For the plaintiff it was argued that the impediment was analogous to an eviction by the tortious act of the defendant as lessor of the premises since the impediment arose from the wrongful act of the lessor himself in demising land which he had already parted with. It was further argued that the case was not distinguishable in principle from the case of an entry upon the lessee under a demise made by the lessor to a stranger immediately after possession had been taken by the lessee and that therefore the defendant was not entitled to distrain at all so long as the plaintiff was kept out of possession of any part of the demised premises by the wrongful act of the defendant.

In its judgment, the court held that the impediment to the plaintiff taking possession of the 8 acres of the demised premises was not analogous to an eviction by the defendant as no interest in the 8 acres previously demised to Adam Charlton passed to the plaintiff by the demise subsequently made to him. The court was also of the opinion on the authority of *Gardiner v. Williamson* (6), that as a demise to Adam Charlton covered the whole time during which the rent distrained for accrued the demise by the plaintiff of the 8 acres in question was wholly void; and that as the rent was reserved in respect of the land professed to be demised and to be issuing out of the whole and every part thereof, and that as the plaintiff as to a portion of the land comprised in the demise had taken no interest and had no enjoyment thereof the distress made by the defendant was not justifiable either in respect of the whole rent reserved or any part of it.

On the evidence in this case, and finding as I do that the conduct of the plaintiffs in refusing to deliver possession of the store to the defendants was inconsistent with the terms of the tenancy agreement and wholly incompatible with the due performance thereof the irresistible inference to be drawn from the conduct of the plaintiffs is that they never had had any intention of putting the defendants into vacant possession of the store. That being so, and as the rent reserved under the agreement was in respect of the whole of the premises

purported to be demised, that is to say, the shop and the store and to be issuing therefrom, and as the defendants were deliberately kept out of the enjoyment of the whole of the premises, I am of the opinion on the authorities above cited, that this action to recover the rent reserved by the tenancy agreement is not maintainable in law. At best, as the demise in question is not by deed, the rent reserved could be regarded as suspended during all the time that the defendants are kept out of the store. The defendants are not liable to pay such rent and no action can successfully be brought to enforce payment of such rent. In the result this action must fail. It is dismissed.

I turn now to the counterclaim by the defendants which is, as already observed, for a refund of a proportion of the rent already paid in respect of the store, the possession of which was never delivered to the defendants. I do not propose to deal at length with this aspect of the case as there was no evidence before me as to what part of the rent fixed under the tenancy agreement was apportionable to either the shop or the store. There was also no evidence that the shop and the store were each of equal value.

It is quite clear that this is not a claim founded on a breach of contract as such for which damages may be awarded, but rather an action to recover rent paid in respect of a part of premises, the possession of which was not delivered to the defendants. In other words, it is an action to recover overpayment in respect of the premises.

In my view it was the duty of the defendants to prove to my satisfaction the apportioned value of the store, the possession of which had been denied them, ascertained at the date when they ought to have been in possession of the said store, that is to say, the date at which the store was withdrawn from the letting. For in law it is the duty of a tenant claiming apportionment to prove the apportioned value of the land withdrawn from the demise, ascertained at the date of such withdrawal. See *Smith v. Malings* (7) and *Salts v. Battersby* (8).

In the circumstances of this case, it is doubtful whether an action to recover a proportion of the rent paid to the plaintiffs is the proper action which should have been brought. The rent having been agreed in respect of the whole of the premises let, that is to say, shop and store, and the plaintiffs having failed to perform their contract in that they deliberately refused to deliver vacant possession of a part of the demised premises to the defendants, it is doubtful whether the plaintiffs are entitled to keep any portion at all of the rent paid. It seems to me that their refusal of vacant possession to the defendants ought to disentitle them to retain any part of the rent received by them. See *Holgate & Others v. Kay* (4) and *Neale v. Mackenzie* (5).

Be that as it may, I am of the opinion that the defendants have failed to satisfy me as to what portion of the rent should be refunded to them. This counterclaim therefore fails.

Finally, in my judgment both the claim by the plaintiffs and the counterclaim by the defendants are hereby dismissed for the reasons appearing in this judgment.

*Action and counterclaim both dismissed.*

For the plaintiffs:

*VN Ponda*

*Shaukat Virji, Daphtary & Co, Kampala*

For the defendants:

*KG Korde*

**Grayson & Co Ltd v A H Wardle (Uganda) Ltd and others**  
[1963] 1 EA 582 (HCU)

**Division:** High Court of Uganda at Kampala  
**Date of judgment:** 21 October 1963  
**Case Number:** 71/1963  
**Before:** Udo Udoma CJ  
**Sourced by:** LawAfrica

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*[1] Guarantee – Construction – “We undertake to guarantee” – Whether this a guarantee or an undertaking to give guarantee when asked.*

**Editor’s Summary**

The plaintiff company sued the defendant company for Shs. 99,317/27 in respect of goods sold and delivered and joined the second defendants as guarantors of the debt. The guarantee was contained in a letter dated June 14, 1962, addressed to the plaintiff company by the second defendants which after stating the consideration continued: “. . . we undertake jointly and severally to guarantee to pay to you on demand all amounts now or at any time so due and owing or unpaid by the principal . . .” By a subsequent letter written in June 1962, by the advocates of the plaintiff company to the defendant company, the advocates confirmed the agreement between the parties and proceeded to set out the terms and conditions upon which the plaintiff company was prepared to supply goods to the defendant company. Condition 3 of this letter reserved to the plaintiff company the right to vary or terminate the agreement reached at any time by giving the defendant company twenty-four hours notice in writing. The defendant company countersigned a copy of this letter in confirmation thereof. On October 24, 1962, when the accumulated debt of the defendant company amounted to Shs. 99,317/27, the plaintiff company by its advocates sent a letter to the defendant company demanding payment and giving notice that in default of payment within three weeks, a petition for winding up the defendant company would be filed without further notice. The defendant company admitted the claim but contended that the plaintiff company had committed a breach by terminating the agreement without notice and claimed damages. The second defendants on the other hand contended that the letter of June 14, 1962, was not a guarantee but an undertaking to furnish a guarantee and therefore could not form the basis of an action.

**Held –**

- (i) on a view of the evidence as a whole, the letter of June 14, 1962, was a guarantee duly given by the second defendants to answer for the default of the defendant company; the parties had intended the letter to be a guarantee and had themselves so regarded it;
- (ii) the letter dated October 24, 1962, was not a notice within condition 3 of the letter written by the plaintiff company’s advocates in June, 1962; the plaintiff company had therefore committed a breach of the arrangement with the defendants by denying further credit to the defendant company

without notice;

- (iii) as no damages had been proved by the defendant company, nominal damages of Shs. 100/- only would be awarded.

Judgment for the plaintiff company on its claim against both defendants. Judgment for the defendant company in the sum of Shs. 100/- damages on its counterclaim.

**Cases referred to in judgment:**

(1) *Heisler v. Anglo-Dal Ltd.*, [1954] 2 All E.R. 770.

(2) *Beaumont v. Greathead* (1846), 2 C.B. 494.

## Judgment

**Udo Udoma CJ:** The claim in this case is for the sum of Shs. 99,317/27 for goods sold and delivered by the plaintiff to the first defendant at the request of and on the personal guarantee given by the second defendants, and interest on the debt. There is also a counterclaim by the first defendant against the plaintiff for damages for a breach of contract by the plaintiff in that the plaintiff failed to give notice to the first defendant as stipulated in the agreement of guarantee. The second defendants are sued as the guarantors of the debt, the principal debtor being the first defendant.

The plaintiff and the first defendant are limited liability companies, and Madhavlal Panachand Hirani and Savitaben Madhavlal Hirani, described in the plaint jointly as second defendants, are company directors, the former being the managing director of the first defendant company.

At the hearing counsel for the defendants applied for, and was granted, leave to amend his statement of defence, and the amended statement of defence already filed was, by consent of both counsel, accepted as the proper statement of defence before the court duly filed and served on the plaintiff, service thereof having been previously effected. Subsequently, paragraph 5 of the amended statement of defence was also, by leave, further amended by adding thereto after the word “plaint” in the second line thereof, the following words:

“The first defendant admits that it owes the plaintiff the sum of Shs. 99,317/27 for goods sold and delivered.”

Consequently, paragraph 9 of the statement of defence was also amended, by leave, to read:

“Wherefore the first defendant prays for judgment against the plaintiff for damages and costs.”

On the admission contained in these latter amendments, on the application of counsel for the plaintiff, judgment was, by consent, entered in favour of the plaintiff against the first defendant only in the sum of Shs. 99,317/27 as claimed, with costs.

It then became clear, and it was agreed by both counsel that there only remained two controversial issues for enquiry and determination by the court. The first such issue was the claim against the second defendants on the agreement which was exhibited in these proceedings and marked Exhibit A. The question for determination thereon was whether Exhibit A was a guarantee properly so called, in which case, the second defendants would be liable thereon. The second concerned the counterclaim for damages by the first defendant against the plaintiff, the counterclaim being based on a agreement, Exhibit B, in these proceedings. Evidence was therefore called on these two issues only. I now propose to examine that evidence.

The facts are, in the main, not in dispute, except as to the question whether or not, before terminating the arrangement envisaged in Exhibit B, any notice was given to the first defendant in terms of the stipulations contained in paragraph 2, condition 3 of the plaintiff’s letter to the first defendant dated June 14, 1962, exhibited in these proceedings and marked Exhibit B.

It appears that the plaintiffs are dealers in cosmetics, pharmaceutical products, patent medicines and such like goods, and that the plaintiff had for several years been dealing with the first defendant as a credit customer, to which such products were supplied by the plaintiff from time to time on the basis of an “open account” of up to between Shs. 30,000/- and Shs. 40,000/-, but not

exceeding Shs. 60,000/-. As I understand it, that means, in effect, that the first defendant, in dealing with the plaintiff in such goods, was treated as a credit customer afforded credit facilities up to but not exceeding Shs. 60,000/-, and was not required to furnish any security or guarantee for such credit.

Then it came about that the first defendant was desirous of increasing such credit facilities, and thereupon opened conversations with the plaintiff in that respect whereby certain arrangements were reached and finally mutually agreed by and between the plaintiff and the first and second defendants. In consequence of that agreement, the second defendants addressed a letter dated June 14, 1962, Exhibit A, to the plaintiff, confirming the agreement, the terms of which were set out therein. In pursuance of the said agreement, Exhibit A, the second defendants also executed in favour of the plaintiff, a second mortgage, Exhibit C, over a certain leasehold property.

The terms of the agreement, Exhibit A, as well as the mortgage, Exhibit C, were also confirmed and accepted by the plaintiff, acting by their solicitor, Messrs. Russell and Company, by their letter to the first defendant, Exhibit B. At the request of the plaintiff, the first defendant also countersigned Exhibit B as having also accepted the terms and conditions therein imposed and stipulated, which terms and conditions included the right on the part of the plaintiff to vary or determine the arrangement then reached by 24 hours notice in writing to the first defendant.

In pursuance of the agreement contained in the letters, Exhibits A and B, and in furtherance thereof, the plaintiff apparently from time to time supplied goods on credit to the first defendant, which, in turn, also issued 90 days promissory notes to the plaintiff to cover the goods so supplied. The plaintiff says that some of those promissory notes, on presentation at maturity, were dishonoured. The result of that was that by October 24, 1962, the amount of debt accumulated and due and payable by the first defendant for goods sold and delivered stood at the sum of Shs. 99,317/27, the subject matter of this suit. Thereupon the plaintiff, by their solicitor, addressed a letter, Exhibit D, to the first defendant demanding payment of the debt and threatening legal proceedings therefor in default.

On receiving the letter Exhibit D, the defendant informed their bankers and also showed the same to the bank. The defendant had done this in the hope of arranging with the bank for the payment of the debt. The bank, on the other hand, instead of accommodating the first defendant, acted expeditiously with a view to protecting its own interest. It not only immediately withdrew all credit facilities which it formerly made available to the first defendant, but also promptly, during the first week of November, 1962, appointed a receiver and manager to take over, and did take over, the first defendant company and the management thereof.

The first defendant says that at the time of the taking over, the stock-in-trade of the company was worth Shs. 200,000/-, exclusive of the value of three motor vehicles, which were then worth about Shs. 40,000/-; but that on the sale of those stocks-in-trade, the receiver and manager was only able to realise the sum of about Shs. 70,000/-.

Now it has been contended for the defendants that the letter, Exhibit A, is not a guarantee but an undertaking to furnish a guarantee, and therefore cannot form the basis of this action. It is said also that no action is maintainable on the face of Exhibit A unless it can be shown that Exhibit A was a guarantee properly so called given by the second defendants in respect of the debts of the first defendant company. Again, it is the case of the defendant that the demand notice, Exhibit D, cannot properly be considered as notice within the terms of condition 3 of paragraph 2 of the letter to the first defendant, Exhibit B, and that

condition 3 of paragraph 2 of Exhibit B has in fact and in law not been complied with as no written notice was ever given to the first defendant before the plaintiff terminated the agreement which afforded the first defendant credit facilities. To that extent, it has been submitted that the plaintiff has committed a breach of the contract between it and the first defendant as contained in the letters, Exhibits A and B, and therefore liable in damages occasioned by such breach. Hence the counterclaim.

For the plaintiff, it has been submitted that the letter, Exhibit A, was a guarantee executed by the second defendants in favour of the plaintiff for the debts of the first defendant; that it was a continuous guarantee; and that for a proper appreciation of it, Exhibit A should be construed as a whole and in the light of and together with the letter, Exhibit B. It is also the contention of the plaintiff that the notice, Exhibit D, was notice in due compliance with the provisions of condition 3 of paragraph 2 of the letter to the first defendant, Exhibit B, and that instead of 24 hours' notice the plaintiff was over-generous to have given the defendant three weeks within which to remedy the situation, which the first defendant failed to do.

I turn now to examine these submissions. For the sake of convenience, I set out the letter, Exhibit A, in extenso hereunder. It reads:

“Dear Sirs,

In consideration of your agreeing, at our request, to grant credit facilities covered by Bills in respect of sales of Cosmetics, Pharmaceuticals, Patent Medicines and goods of a similar nature to A. H. Wardle (Uganda) Limited of P.O. Box 1671, Kampala (hereinafter called the “the Principal”) on terms already agreed between yourselves and that Company at and from your Kampala branches, we undertake jointly and severally to guarantee to pay to you on demand all amounts now or at any time so due and owing or unpaid by the Principal but with a limitation that our total liability hereunder shall not exceed Shillings one hundred thousand (Shs. 100,000/-) in respect of the aggregate outstanding accounts in your name.

By way of further security I, Madhavlal Panachand Hirani, hereby undertake to execute at your request a Second Legal Mortgage in respect of the premises known as plot No. 22, Tagore Crescent, Kololo, Kampala contained in Leasehold Register Volume 319, Folio 17, of which I am the registered proprietor to secure all amounts hereby guaranteed by me.

This guarantee will not be satisfied by any intermediate repayment of the whole or any part of the said amounts, but will remain in force as a continuing security for the full balance outstanding (subject to the above limit) until notification from you that the amounts so owing have been paid in full and the said credit facilities terminated.

Subject to the above limitation as to maximum liability, you may at any time or times determine, enlarge or vary any credit to the Principal and grant time or other indulgence to and enter into any composition or arrangement with the Principal or any other person without discharging or impairing this guarantee or any liability hereunder.

This guarantee shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security now or hereafter held by you for all or any part of the amounts hereby guaranteed nor shall any such collateral or other security or any lien to which you may be otherwise entitled be in any way prejudiced or affected by this guarantee.

This guarantee shall not be revoked by any change in the constitution of the Principal nor by the death or release of any individual guarantor.

Dated this 14th day of June, 1962.”



The above letter, Exhibit A, was signed by the second defendants. Later, another letter, Exhibit B, was addressed to the first defendant by the plaintiff's solicitor. It was countersigned by the first defendant. Exhibit B is in the following terms:

"Dear Sirs,

This will serve to confirm the agreement arrived at between your Company and our clients, Grayson & Co. Ltd. of P.O. Box 30198, Nairobi during a meeting which took place at your offices at Kampala on Friday the 1st day of June 1962.

In consideration of the personal guarantees by your Directors Mr. M. P. Hirani and Mrs. S. M. Hirani contained in their letter addressed to our clients dated the 14th day of June 1962, and the Second Mortgage executed by Mr. M. P. Hirani in respect of the lands comprised in Leasehold Register Volume 319, Folio 17 by way of further security, our clients are prepared to grant your Company credit facilities up to the maximum amount outstanding at any one time of Shillings one hundred thousand (Shs. 100,000/-) on the following terms and conditions: –

1. Our clients will supply goods to you for which you will issue Promissory Notes payable on ninety (90) days from the date of our clients' statement.
2. You undertake to sell wholesale only those goods set out in the schedule annexed hereto and no other articles unless you have first obtained our clients' prior written consent.
3. Our clients have the right to vary or terminate the above arrangement at any time by giving you twenty-four (24) hours written notice.

By way of confirmation, kindly countersign the enclosed carbon copy of this letter and return same to us."

Now the submission for the defendant is that the letter, Exhibit A, is not a guarantee because the expression used is: "*We undertake jointly and severally to guarantee to pay to you on demand*", etc. and not "*We guarantee jointly and severally to pay to you on demand*", etc. which should have been the proper expression if Exhibit A was ever intended as a guarantee. It is said further that if Exhibit A was a guarantee, there was no reason why it was expressed in the language set out above, and that on its face, Exhibit A cannot be regarded as anything more than a mere undertaking to furnish a guarantee at a later date if, and when, called upon so to do. As his authority for the proposition that, phrased as it is, namely, "*We jointly and severally undertake to guarantee*", etc. Exhibit A cannot be regarded as a guarantee, Mr. Shah cited and relied upon *Heisler v. Anglo-Dal, Ltd.* (1). It suffices, however, to observe that the decision in *Heisler v. Anglo-Dal, Ltd.* (1), is irrelevant to the issues involved in the instant case. There, in a contract dated October 7, 1952, the plaintiff therein, as vendor of certain goods to be delivered in Antwerp within thirty days of the defendants therein establishing a confirmed, irrevocable, transferable and divisible letter of credit, had entered into an undertaking in the following words:

"We [the plaintiff] undertake to furnish you [the defendants] with a ten per cent. guarantee that we will deliver the goods to your forwarding agents in Antwerp as soon as we receive confirmation from your bankers that the necessary letter of credit . . . will be established in our favour . . ."

By a letter dated October 20, the defendants' bankers wrote that they would open the necessary letter of credit in the defendants' favour only on condition that they received from the defendants, within fourteen days, a sum equivalent



to ten per cent. of the value of the goods. As a result of further negotiations between the plaintiff and the defendants' representatives, the plaintiff wrote to the defendants as follows:

"We herewith guarantee to deliver three hundred metric tons of aluminium ingots . . . to your forwarding agents in Antwerp and undertake to pay to you . . . ten per cent. of the amount of the goods we have sold to you if we default to deliver the three hundred tons."

In his letter forwarding to the defendants the above guarantee, the plaintiff asked for a confirmation of the credit. In reply, the defendants demanded an agreed bank guarantee within the next four days. On November 18, 1952, the defendants informed the plaintiff that they were no longer interested. The defendants contended that under the terms of the contract they were entitled to a bank or third party guarantee prior to providing the plaintiff with confirmation and did not continue with the fulfilment of the contract.

In an action for damages, Devlin, J., as he then was, held that the defendants had committed a breach of contract. On appeal, confirming the decision, it was held that on the construction of the contract of October 7, 1952, the plaintiff's undertaking to furnish the defendants with the guarantee could be satisfied by furnishing to them the plaintiff's personal guarantee and that the plaintiff's letter of October 24 was a compliance with his undertaking, and accordingly the defendants, having failed to provide a confirmation of the letter of credit, were in breach of the contract.

The issue was therefore one concerning the type, i.e. personal or third party, of guarantee requisite in fulfilment of the undertaking of October 7, 1952, and not as to the meaning, effect and implication of the phrase "We undertake", etc. as in the present case.

It is fair to say that the disposal of this authority does not however dispose of the particular issue of controversy in the instant case, which is as to the meaning, import and effect of the phrase "*We jointly and severally undertake to guarantee*", etc. in Exhibit A. Read in isolation, the phrase does give the impression that Exhibit A was nothing more than an undertaking for a future guarantee. The phrase is not a particularly happy one in the context of Exhibit A. It is unfortunate that the agreement should have been so phrased. Indeed, there is considerable force and strength in the submission that, judged by this phrase, Exhibit A was a mere undertaking, when it is realised that in consequence of the use of a similar phrase in the second paragraph of Exhibit A, namely, "*We undertake to execute at your request a second legal mortgage*", the second defendants had executed the second mortgage, Exhibit C, in favour of the plaintiff in fulfilment of that undertaking. On the other hand, if the parties did not clearly intend that Exhibit A should be a guarantee, it is conceivable, and indeed reasonable to suppose that it would have been followed by the execution of a guarantee in the same way as the second mortgage, Exhibit C, having regard to the circumstances of this case.

On a careful consideration of the evidence as a whole, I am of the view that Exhibit A considered as a whole together with the letter Exhibit B leaves one in no doubt that it was a guarantee duly given by the second defendants to answer for the defaults of the first defendant, that is to say, "to pay all amounts now or at any time so due and owing or unpaid by the principal". It is not without significance that in paragraphs 3, 4, 5 and 6 of Exhibit A, the letter Exhibit A is constantly referred to and described by the second defendants themselves as "this guarantee". I believe that both the second defendants and the plaintiff had intended Exhibit A to be a guarantee and themselves so regarded it. I am reinforced in this belief by the letter, Exhibit B, and the admission by

the defendant in his evidence. Under cross-examination, the defendant Madhavlal Panachand Hirani (D.W. 1) gave certain answers to questions put to him by counsel for the plaintiff as follows:

- “Q. Is it true that at a certain stage the plaintiff company refused credit facilities to the defendant company unless you and your wife would give the company a personal guarantee?
- A. Yes, that is correct.
- Q. You, that is yourself and your wife, duly gave that guarantee?
- A. Yes, that guarantee was Exhibit A. We both signed it. I also confirmed by signing Exhibit B, that Exhibit A was that guarantee. . . . I believed that Exhibit A was a guarantee and I acted upon it as such. I do not deny that Exhibit A is a guarantee given by my wife and myself.”

It is noteworthy that in paragraph 2 of Exhibit B, which is the foundation of the counterclaim by the first defendant, Exhibit A is described as the personal guarantees of the second defendants.

On a proper construction of the letter, Exhibit A, as a whole, and on a careful consideration of the whole of the evidence before the court, I am satisfied, and hold that Exhibit A is a guarantee which was entered into and given by the second defendants to the plaintiff in consideration of the plaintiff accepting to grant and granting credit facilities up to the maximum amount outstanding at any one time of Shs. 100,000/- to the first defendant at the request of the second defendants. The second defendants are therefore liable on their personal guarantees, the first defendant, as the principal debtor, having made default in the payment of the sum of Shs. 99,317/27, for which judgment has already, by consent, been entered in favour of the plaintiff as against the first defendant. There will therefore also be judgment against the second defendants for the same sum and for interest at six per cent., with costs. This judgment is entered against the second defendants purely as guarantors of the debt owed by the first defendant.

I now propose to deal briefly with the counterclaim. The case of the first defendant on the counterclaim is that the plaintiff had failed to comply with condition 3 of paragraph 2 of the letter, Exhibit B, in that the letter of October 24, 1962, Exhibit D, cannot properly be regarded as notice within the contemplation of that paragraph. The purported notice is as set out hereunder:

*“Re: Grayson & Company Limited*

Take notice that you are indebted to our clients, Messrs. Grayson & Company Limited in the sum of Shs. 99,317/27.

We hereby demand payment of the said sum of Shs. 99,317/27 on behalf of our clients, above named, and give you formal notice that failing payment within the period of three weeks from the date hereof, our clients have instructed us to file a petition for winding up of your company without further notice.”

In the above letter, Exhibit D, there is nothing mentioned about the arrangement having been determined or likely to be determined at a given time. In my view, Exhibit D is nothing more than an ordinary notice demanding payment and threatening legal action in default. It is not a notice in exercise of the right reserved under paragraph 2, condition 3 of Exhibit B terminating the relationship between the first defendant and the plaintiff, although that might be the effective result of it. As Exhibit D stands, two probabilities appear to emerge. The first probability is that the relationship between the plaintiff and the first defendant was still subsisting, it not having been formally or otherwise determined by notice, in which case Exhibit D was an ordinary letter demanding a

debt and threatening legal action in default, without in any way impairing the relationship of the first defendant and the plaintiff. The second probability is that Exhibit D was sent to the first defendant on the presupposition that the relationship between the plaintiff and the first defendant no longer existed. It had come to an end, the plaintiff having tacitly and without notice brought it to an end and thereby effectively withholding from or refusing the first defendant such credit facilities as were formerly made available to it.

I think the evidence before the court supports the second probability. The first defendant's case, which I accept, is that on October 24, 1962, when the company received Exhibit D, it was only indebted to the plaintiff in the sum of about Shs. 59,887/-, which was then covered by bills and notes maturing up to October 31, 1962, some of which were dishonoured by the bank. The total bills dishonoured were about Shs. 65,718/-. The first defendant depended upon the plaintiff for supplies which were then not forthcoming. The plaintiff had then refused further credit to the first defendant, and that made it impossible for the first defendant to carry on normally.

When, therefore, the bank appointed a receiver/manager and took possession and control of the company early in November, 1962, the first defendant was completely out of business. I find that Exhibit D was not "notice" in the contemplation of condition 3 of paragraph 2 of Exhibit B. It was certainly not "notice" terminating the relationship between the plaintiff and the first defendant. I am of the opinion, of the evidence, that the plaintiff had denied further credit to the first defendant without notice, and therefore in breach of the agreement between them, i.e. in breach of paragraph 2, condition 3 of Exhibit B. The plaintiff is therefore liable in damages to the first defendant.

The question is, what damages should be awarded to the first defendant? Neither in the pleading nor in the evidence was there any allegation that the first defendant had suffered damages in consequence of this technical breach of contract. I agree with the submission of the counsel for the plaintiff that no damages have been proved by the first defendant. The only evidence before the court, if evidence it must be called, is that when the bank took over the shop, the business was worth Shs. 200,000/-, exclusive of three motor vehicles worth about Shs. 40,000/-; but that the manager, on the sale of the contents of the shop, only realised Shs. 70,000/-. Neither the bank nor the receiver/manager was called to testify before this court. I must therefore reject this piece of evidence as most unsatisfactory.

Counsel for the defendants was appreciative of this deficiency on the question of damages when the court drew his attention to it. While agreeing that there was no evidence in proof of damages before this court, counsel also suggested that in the event of the court finding for the first defendant on the counterclaim, it might reserve its decision on the award of damages to enable the first defendant to call evidence of such damages. No authority was cited for this extraordinary suggestion, nor was the court given any reason why that should be done. One would have thought that a litigant who has suffered damages would have sought to establish such damages at the first available opportunity at the trial of the case.

At all events, the first defendant is entitled to judgment on the counterclaim, which is accordingly entered in its favour, but having failed to prove damages, I think it is also entitled to nominal damages, that is to say, such damages as were defined by Maule, J., in *Beaumont v. Greathead* (2) as "a mere peg on which to hang costs" as an indication that the court recognizes that there was an infraction of a legal right which entitles the first defendant to its judgment. I will therefore award the first defendant Shs. 100/- as general damages, with costs.

To sum up my judgment in this case.

- (1) On the plaintiff's claim against the first and second defendants, judgment is entered for the plaintiff and against the first and second defendants in the sum of Shs. 99,317/27, with interest at six per cent. and costs.
- (2) On the counterclaim by the first defendant, judgment is entered for the first defendant in the sum of Shs. 100/- as general damages for a breach of contract, with costs against the plaintiff. Order accordingly.

*Judgment for the plaintiff company on its claim against both defendants. Judgment for the defendant company in the sum of Shs. 100/- damages on its counterclaim.*

For the plaintiff:

*REG Russell*

*Russell & Co, Kampala*

For the first and second defendants:

*JS Shah*

*JS Shah, Kampala*

## **Administrator-General Zanzibar v W H Jones & Co Limited** [1963] 1 EA 590 (CAZ)

|                          |  |
|--------------------------|--|
| <b>Division:</b>         | Court of Appeal at Zanzibar                    |
| <b>Date of judgment:</b> | 24 October 1963                                |
| <b>Case Number:</b>      | 16/1963  |
| <b>Before:</b>           | Sir Trevor Gould V-P, Crawshaw and Newbold JJA |
| <b>Sourced by:</b>       | LawAfrica                                      |
| <b>Appeal from:</b>      | H.M. High Court of Zanzibar – Horsfall, Ag CJ  |

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*[1] Administration of estates – Deficiency – Estate of merchant insolvent – Stock-in-trade of estate pledged to creditor by executor – Consideration given by creditor – Validity of pledge – Succession Decree (Cap. 21), s. 274 (Z.).*

### **Editor's Summary**

In August, 1959, a shopkeeper died leaving a large stock-in-trade but little cash and a bank overdraft. At his death there were many creditors including the respondent company. The son of the deceased was by will appointed executor and, believing the estate to be solvent, he arranged with the respondent company that in consideration of the respondent company not taking action he, on behalf of the estate, would pay

the debt by instalments. He also personally guaranteed payment. At the same time, as security for payment, the son pledged certain stock-in-trade and handed over the pledged stock to the respondent. The son administered the estate for some time and paid off certain debts. Then default in payment of the instalments occurred and the respondent company filed a suit against the son personally, and also against him as administrator ad litem of the estate. Later the son, who had intended to obtain but had not obtained probate, renounced his executorship and the Administrator-General was granted letters of administration with the will annexed. In the respondent company's action the Administrator-General was substituted for the son as administrator ad litem and by consent judgment was given against the Administrator-General. The goods pledged remained in possession of the respondent company and at the end of 1960 the Administrator-General questioned the validity of the pledge in the event of the estate proving insolvent. Subsequently on the application of the Administrator-General the court ordered that the remaining stock-in-trade, including the pledged goods be sold for a specific sum and that the respondent company should test the validity of the pledge by

action. In those proceedings the judge held that the pledge was a preference of the respondent company over other creditors, but that since the respondent was a decree holder against the Administrator-General and there had been no fraud in obtaining either pledge or decree, the pledge was valid. On appeal it was common ground that, but for s. 274 of the Succession Decree, the pledge was valid and binding on the Administrator-General. The appellant submitted that s. 274 prohibits any payment to a creditor except rateably with all other creditors and gives to each creditor such an interest in the estate as would enable him to follow the assets in the hands of any other creditor who had, contrary to the section, received more or acquired any right entitling him to receive more than his rateable share. The respondent contended that s. 274 merely sets out a rule of procedure designed to abolish the English provision whereby an executor has the right to pay one creditor in preference to other creditors of the same class and that it confers no right on any creditor against any other creditor.

**Held** – s. 274 of the Succession Decree merely abolishes the common law right of an executor to prefer one creditor to another of the same class; the section confers no right upon a creditor against another creditor nor any right to a creditor, or a subsequent personal representative, to follow assets given, or to require a refund of payment made by a former personal representative to a creditor in satisfaction of a debt owed by the estate to the creditor; accordingly the pledge was valid.

Appeal dismissed.

#### **Cases referred to in judgment:**

- (1) *Mathuradas v. Raimal* (1935), A.I.R. Bom. 385.
- (2) *Kissondas Premchand v. Jivatlal Pratapshi & Co.* (1936), Bom. L.R. 864; (1936) A.I.R. Bom. 423.

October 24. The following judgments were read by direction of the court:

#### **Judgment**

**Newbold JA:** This appeal raises the question of the validity of a pledge given by the executor of an estate which turns out to be insolvent to a creditor of the estate. The learned judge of the High Court held that the pledge was valid and from that decision the Administrator-General, as administrator of the estate of Abdulrehman Hasham deceased, has appealed.

The relevant facts may be shortly stated as follows. On August 26, 1959, Abdulrehman Hasham, who was a shopkeeper, died leaving a large stock-in-trade but little cash and an overdraft at the bank. At the time of his death he owed the respondent, W. H. Jones & Co. Ltd., a debt of Shs. 33,544/35. His son, Ahmed, was appointed executor under a will dated May 20, 1958, and at once assumed the duties of an executor. Ahmed was aware of a number of creditors of the estate but believed the estate to be solvent. The creditors generally, and the respondent in particular, began pressing for payment of their debts and Ahmed thought that the best course was to carry on the shop and sell the stock-in-trade in order to meet the debts. In a number of cases the debts were paid. On November 25, 1959, the respondent and Ahmed came to an arrangement whereby in consideration of the respondent not taking action Ahmed, on behalf of the estate, undertook to pay the debt by instalments and he also personally guaranteed payment; and the arrangement included a provision that if any instalment was not paid on the due date the entire amount outstanding would then become due. At the same time, as security for such due payment, Ahmed pledged, with a power of sale in the event of default,

certain stock-in-trade of the estate and handed the pledged stock-in-trade over to the respondent. Default in payment of the instalments occurred and on May 18, 1960, the respondent filed a suit against Ahmed personally and also against him as administrator ad litem of the estate. Although Ahmed had intended to take out probate in fact he did not do so; and on May 10, 1960, he renounced his executorship after finding a will dated May 28, 1958, in which he was not specifically named as executor. Following this renunciation letters of administration with the will of May 28, 1958, annexed were granted to the Administrator-General on July 7, 1960. The Administrator-General was substituted for Ahmed in the suit above referred to in so far as Ahmed was sued as administrator ad litem and by consent on September 26, 1960, judgment was given in that suit against the Administrator-General. The goods pledged remained in possession of the respondent and at the end of 1960 the Administrator-General questioned the validity of the pledge in the event of the estate proving insolvent. On March 16, 1962, the Administrator-General applied to the court for an order empowering the sale of all the remaining stock-in-trade, including the pledged goods, for a specified sum. In that application it was stated that when the Administrator-General assumed administration of the estate it had been partly administered, some creditors had been paid, and as the assets were more than ample to discharge liabilities Ahmed had been allowed to retain certain stock-in-trade equivalent to the value of his claim against the estate, which claim included the debts of the estate which had been paid by him during his period of administration as executor; and in the application it was further stated that for the reasons set out it now appeared that the assets were insufficient to meet the debts of the estate. The court ordered the sale of all the stock-in-trade in accordance with the prayer of the application and also ordered that the respondent should test the validity of the pledge by a suit. This the respondent did, and it is from the decision in that suit that this appeal is now brought.

The learned judge found or held that Ahmed was acting as executor when he gave the pledge; that an executor has power to pledge movable property without first obtaining probate; that the pledge was a preference of the respondent over other creditors; and that, as the respondent was a decree holder against the Administrator-General and as there had been no fraud in obtaining either the pledge or the decree, he could have obtained satisfaction of the decree out of the goods pledged and thus the pledge was valid. Though no specific finding was made on these matters, it seems clear that the judge considered that the pledge was not a fraudulent preference; that all parties at the time the pledge was given and the decree obtained assumed, with good reason, that the estate was solvent; and that the giving of the pledge was in the best interests of the estate.

It is not in dispute that the relevant provisions of the Succession Decree (Cap. 21) apply, nor that, but for s. 274 of the Succession Decree, the pledge given by Ahmed was valid and binding on the Administrator-General. It is also agreed that the validity of the pledge must be decided on the basis that the pledged goods had remained in the possession of the respondent. As I understand the basis of the decision of the learned judge, it is that as the respondent could have obtained satisfaction of his decree out of the pledged goods by execution proceedings therefore the pledge was valid; but counsel on both sides agreed that the ability of the respondent to obtain satisfaction of the decree is irrelevant to the issue of the validity of the pledge.

In essence the submissions of counsel for the Administrator-General are that s. 274 is a basic departure from the law of England; that the section prohibits any payment to a creditor except rateably with all other creditors and gives to each creditor such an interest in the estate as would enable him to follow the assets in the hands of any other creditor who had, contrary to the section,



received more, or acquired any right entitling him to receive more, than his rateable share; and, consequently, that an executor should in administering an estate conduct himself as an official assignee of an insolvent estate. For these submissions he relied on the decision in *Mathuradas v. Raimal* (1).

Counsel for the respondent submits that s. 274 merely sets out a rule of procedure designed to abolish the English provision whereby an executor has the right to pay one creditor in preference to other creditors of the same class; that it confers no rights on any creditor against any other creditor; and that the construction urged on behalf of the Administrator-General had never been adopted in the administration of estates and if adopted would make such administration intolerable and would render meaningless the provisions of s. 112 (2) of the Insolvency Decree (Cap. 20). For these submissions he relied on the decision in *Cissoids Preached v. Jivatlal Pratapshi & Co.* (2).

The decisions in those two cases were given on the section of the Indian Succession Act corresponding to s. 274 of the Succession Decree, and the decision in *Kissondas's* case (2) was given after consideration of the decision in *Mathuradas's* case (1). I have studied the judgments in these two cases with care and I have no doubt that, for the reasons so ably expressed by Rangnekar, J., in *Kissondas's* case (2), the submissions of counsel for the respondent are correct.

Section 274 of the Succession Decree reads as follows:

- “274. (1) Save as aforesaid, no creditor is to have a right of priority over another.
- (2) The executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.”

It is to be noted that sub-s. (1) states “no creditor is to have a right of priority over another” and not “no creditor shall have priority over another”. The wording of this section is clearly more consonant with the removal of an executor’s right to give preference than with the grant to a creditor of rights which attach to the assets of the estate, the more especially when no specific right to follow the assets, nor any procedure whereby a right over the assets may be enforced, is given. The absence of any such specific right to follow the assets is all the more significant having regard to the provisions of ss. 315 and 316 of the Succession Decree which give to a creditor the right to follow assets in the hands of a legatee.

Apart from any question as to the means whereby a creditor could enforce any right to rateable payment, it is clear that there are exceptions to the right itself. The section itself refers to one – i.e. there is only to be rateable payment of such debts as the executor is aware. At what time that knowledge must exist and in what manner it must be obtained is not clear. Another exception must arise in respect of a creditor who comes in late after dividends have already been distributed in the case of an estate which has been administered under order of the court. It may well be that there are other exceptions, such as, for example, a payment by an executor to a creditor when there was every reason to believe at the time when the payment was made that the estate was solvent and that there was thus no question of preferring one creditor over another. Whatever exceptions may exist, however, to this rule of rateable payment of all creditors, the inconvenience which would result to everyone if an executor could not safely pay any debt (especially where the estate included a business which was being carried on) until all the assets had been realised, and it was clear that all the debts could be met, is manifest. The loss and damage which might be caused both to the estate and to the general body of creditors by adopting such



a construction of s. 274 is incalculable. Such a construction would require every estate to be treated as if it were insolvent and there could scarcely be a better way of converting a solvent estate into an insolvent one.

I am satisfied that s. 274 merely abolishes the common law right of an executor to prefer one creditor to another of the same class, and that this section confers no right upon a creditor against another creditor nor does it confer on a creditor, or a subsequent personal representative, any right to follow assets given, or to require a refund of payment made, by a former personal representative to a creditor in satisfaction of a debt owed by the estate to the creditor. What rights the section gives to a creditor against a personal representative, who has paid another creditor's debt in full and subsequently the estate turns out to be insolvent, I leave for consideration if and when the question arises.

For these reasons, which are different from those given by the learned judge, I consider that the pledge was valid and I would accordingly dismiss the appeal with costs. It has been accepted by counsel for the Administrator-General that if the appeal is dismissed any order for costs must be against the Administrator-General and not out of the estate.

**Gould V-P:** I agree and have nothing to add. The appeal is dismissed with costs as proposed by the learned Justice of Appeal.

**Crawshaw JA:** I also agree.

*Appeal dismissed.*

For the appellant:

*Adrian Roden and AMS Parkar  
Parkar & Co, Zanzibar*

For the respondent:

*KS Talati and PS Talati  
Wiggins & Stephens, Zanzibar*

**H J Stanley & Sons Ltd v Akberali G Saleh Alibhai**  
[1963] 1 EA 594 (HCT)

|                          |   |
|--------------------------|---|
| <b>Division:</b>         | High Court of Tanganyika at Dar-Es-Salaam |
| <b>Date of judgment:</b> | 27 August 1963                            |
| <b>Case Number:</b>      | 174/1962                                  |
| <b>Before:</b>           | Spry J                                    |
| <b>Sourced by:</b>       | LawAfrica                                 |

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[1] *Landlord and tenant – Action for arrears of rent – Claim based on contract – No evidence given of*

*any tenancy agreement – Claim not founded on use and occupation – Whether relief can be granted on basis of use and occupation.*

*[2] Pleading – Landlord and tenant – Claim for rent – Claim based on contract – No evidence given of any tenancy agreement – Use and occupation not pleaded – Whether relief can be granted on basis of use and occupation.*

### **Editor's Summary**

The plaintiff company sued for Shs. 19, 759/75 in respect of rent due, and in the plaint alleged a verbal agreement to rent the premises at a monthly rent of Shs. 500/- on about August 1, 1959. There was evidence that on October 27, 1959 the plaintiff company served the defendant with a notice to quit on November 30, 1959. At the hearing the plaintiff company claimed but had not pleaded that the defendant continued in use and occupation after November 30, 1959. The issues framed by the court were (a) was there an oral agreement between the parties for the letting, and if so what were its terms, (b) was the defendant a tenant of the plaintiff company at all material times, and (c) what amount, if any, was due by the defendant. It was argued on behalf of the defendant that the plaint did not disclose a cause of action, that it should either have averred an

agreement expressly covering the period for which rent was claimed, or have averred use and occupation, and that if there was any claim against the defendant for rent accruing after the letter of October 27, 1959, it could only be a claim for use and occupation, which had neither been pleaded nor proved.

**Held –**

- (i) the plaintiff company had failed to prove that there was an agreement for letting but had established that a tenancy existed until determined by notice to quit given on October 27, 1959;
- (ii) notwithstanding the deficiencies in the plaintiff's case the court was entitled to consider whether the evidence proved the relationship of landlord and tenant, a question which was clearly in issue under the second of the issues framed;
- (iii) after the notice to quit had expired, the defendant was a tenant at will, if at all, that question depending on whether or not use and occupation was enjoyed;
- (iv) having regard to the terms of the plaintiff's case and the issues framed, the defendant was entitled to assume that use and occupation were not in issue;
- (v) it was not open to the court to grant relief based on use and occupation since that was an allegation of fact of which the defendant had no notice.

Suit dismissed with costs.

**Cases referred to in judgment:**

- (1) *Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A.C. 218; [1955] 2 All E.R. 864.
- (2) *Sagarmull Nathany v. John Carapiet Galstaun*, [1930] A.I.R. P.C. 205.
- (3) *Haji Khan v. Baldeo Das* (1901), 24 All. 90.
- (4) *Daim and Others v. Khanu and Others* (1927), 8 Lah. 655.
- (5) *Clark v. Grant and Another*, [1949] 1 All E.R. 768.
- (6) *Harding v. Crethorn* (1793), 1 Esp. 57; 170 E.R. 278.
- (7) *Christy v. Tancred, Finley and Others* (1840), 7 M. & W. 127.
- (8) *Ketu Das v. Surendra Nath Sinha*, [1903] C.W.N. 596.
- (9) *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] 1 K.B. 130; [1956] 1 All E.R. 256.
- (10) *Low v. Bouverie* (1891), 3 Ch. 82.

**Judgment**

**Spry J:** This is an action for rent alleged to be due and unpaid in respect of a building in the township of Kilindoni, Mafia Island.

At the beginning of the proceedings counsel for the defendant submitted that the plaintiff did not disclose a cause of action. I ruled against him, and I will now briefly give my reason.

The plaintiff alleges that the plaintiff company is the owner of Plot No. 14, Market Street, Kilindoni; that by a verbal agreement made on or about August 1, 1959, the plaintiff company “rented the premises erected on the said plot to the defendant at a monthly rental of Shs. 500/-only”; that Shs. 19,759/75 is due as arrears of rent; and that the defendant has failed to pay that amount in spite of repeated demands.

Counsel for the defendant argued that the plaintiff should either have averred an agreement expressly covering the period for which rent is claimed, or have averred use and occupation. I do not propose to deal in detail either with the lengthy arguments advanced by counsel or the authorities cited by them. The view that I took was that while in the event the plaintiff might prove defective, it was not necessarily so. An agreement might have been made on the terms set out in the plaintiff, and such an agreement might be capable of enforcement. It would be for

the court to decide whether such an agreement gave rise to a monthly or other tenancy. If the tenancy were a monthly one it would continue until determined, and if such a tenancy had been created by express agreement it would not be necessary to plead use and occupation.

The issues framed by the court after hearing counsel were as follows: (1) Was there an oral agreement between the plaintiff and the defendant for the letting of the building on Plot 14, Market Street, Kilindoni, and if so what were its terms? (2) Was the defendant a tenant of the plaintiff at all material times? (3) What amount, if any, is due?

I have already referred to the main averment in the plaint of a verbal agreement which was said to have been made on or about August 1, 1959, between “the defendant and the manager of the plaintiff company”. Every contract must of course be created at a particular moment. However protracted the preliminary negotiations may have been and whatever variations may subsequently be agreed, there must be a moment when the agreement between the parties causes a contractual relationship to come into being. It was for the plaintiff to prove that that had happened. Evidence was given by Mr. H.J. Stanley, a director of the plaintiff company, that the manager referred to in the plaint was a Mr. H. K. Bhanji. Mr Bhanji was then called, but he was never asked whether he had in fact entered into any agreement. No explanation was offered and no application was made for leave to amend. On the face of it the plaintiff company completely failed to prove the basic fact on which it relied.

While there was no evidence of the making of a contract, there was however evidence which might be held to show a relationship of landlord and tenant. Before examining this I must consider whether I am entitled to do so, in view of the lack of any allegation in the plaint of such a relationship except as created by the alleged agreement which was not proved. The general rule is that relief not founded on the pleadings is not granted, but this is not such an absolute rule as to preclude the granting of relief where the allegations at the hearing are not inconsistent with the pleadings and are not based on allegations of fact of which the other side had no notice.

The underlying philosophy was summarised by Lord Normand in *Esso Petroleum Co., Ltd. v. Southport Corporation* (1), ([1956] A.C., at p. 238):

“The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.”

A case somewhat similar to the present was *Sagarmull Nathany v. John Carapiet Galstaun* (2), in which the suit was based on an agreement; a subsequent variation of the agreement was not pleaded but was put in issue. Lord Tomlin in his speech said:

“Their Lordships are satisfied that notwithstanding the form of the plaint the suit was fought by the parties deliberately upon issues substantially as framed by the trial Judge and ought upon that footing to be determined.”

Again in *Haji Khan v. Baldeo Das* (3), an appeal in which relief was refused, Chamier, J. observed:

“I am most unwilling to bind a plaintiff too closely to his plaint in a case of this kind, and I agree with the opinion expressed by Aikman, J., that a suit like the one before us should not be dismissed merely because the plaintiff fails to prove that he leased the premises to the defendant, and that if a court sees that the plaintiff is entitled to the relief which he claims, although on

grounds other than those put forward in his plaint, the court should give that relief, if the defendant would not thereby be taken by surprise.”

In *Daim and Others v. Khanu and Others* (4), Harrison, J., went further and said (8 Lah., at p. 658):

“It appears to us that the plaintiffs having put their grievance before the court and having roughly described their cause of action . . . we are of opinion that relief should be given to them if they succeed in showing that they are entitled to it.”

In that case, however, the court was clearly influenced by the fact that there had been mistakes of pleading on both sides, and I think the words I have quoted are probably too liberal to be regarded as of general application.

I am not unmindful of the remarks of Lord Radcliffe in the *Esso Petroleum* case (1), cited above when he said ([1956] A.C., at p. 244):

“In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument. It is clear that no application was made to the trial judge to amend the pleadings by altering or extending the particulars, and it is equally clear from what he says at the close of his judgment that he did not regard himself as having expressly or impliedly authorised any such amendment.”

That case was, however, an action for negligence, and I do not think the opinion I have quoted is relevant to proceedings such as these.

The conclusion I have reached is that notwithstanding the deficiencies in the plaint I am entitled to consider whether the evidence proves the relationship of landlord and tenant, a question which was I think clearly in issue under the second of the issues framed. It may not be entirely irrelevant to observe that that was an issue suggested by learned counsel for the defendant.

The evidence produced by the plaintiff company was as follows. First there was evidence of title comprising two deeds, dated respectively June 15, 1956 and August 13, 1959. Both deeds were made between the defendant as administrator of the estate of his late father and one Fazal Saleh Mohamed Alibhai of the one part and the plaintiff company of the other. The first was a deed of mortgage and the second, although not so expressed, a conveyance of the equity of redemption. The properties comprised in both deeds include one described as follows:

- “8. One house presently occupied by Saleh Alibhai’s family adjoining the Jamatkhana, Kilindoni being a double-storeyed stone house with C.I. sheets roof, being Plot No. 14 situated at Market Street, Kilindoni, Mafia Island.”

Secondly there was the evidence of Mr. Stanley, who said that there was discussion between the defendant and himself on various occasions regarding the renting of the property. He said that agreement was reached for a rental of Shs. 500/- per month. He said that the house was occupied by the defendant’s family, except for a part which was sub-let. He said that numerous demands had been made for payment of the rent, but that nothing had been paid. Thirdly there was the evidence of Mr. Bhanji, who said that as manager for the plaintiff company he used monthly to debit the defendant with rent for the house, and used regularly to send invoices to the defendant at his Mafia shop. He did not specify the period during which he made the relevant entries and prepared the invoices. No books of account or duplicate invoices were produced, but what purports to be a statement of account was annexed to the plaint.

A letter was also produced written by Mr. Bhanji to the head office of the plaintiff company, but this is my opinion of little evidential value. It reported negotiations which Mr. Bhanji had with the brother of the defendant. There was, however, no evidence to show that the brother had any authority to negotiate on behalf of the defendant. The letter may therefore show that the plaintiff company was at that time asserting a claim, but it certainly does not prove that the claim was a valid one or that it was admitted by the defendant.

For the defendant a copy was produced of a letter dated October 27, 1959, addressed to the defendant and signed by Mr. van Dalfsen as manager for the plaintiff company. This reads as follows:

“Dear Sir,

We refer to your request to rent the house Plot No. 14, which at present is being occupied by you, and we regret to advise you that we are not able to let the house to you after the 30th of November, 1959.

Would you therefore please vacate it by the above mentioned date.

We enclose our Invoice No. 5349 for Shs. 1,806/45 in respect of rent from 13th of August until 30th of November, at the rate of Shs. 500/- per month.”

The defendant himself gave evidence. He denied that there had ever been a tenancy agreement. He conceded in cross-examination that he had been asked to pay rent “very often” but said that he had always refused, denying liability.

Counsel for the plaintiff company submitted that the letter of October 27, 1959, was in itself sufficient evidence of a letting. With that I cannot agree, but I do think that the letter affords strong corroboration of the evidence of Mr. Stanley, particularly since the defendant admitted having received it and not having replied to it in writing. Counsel further argued that the documents of title to which I have referred showed that the defendant and his family had been in occupation of the house at the time when title was passed to the plaintiff company, and that there had been agreement for that occupation to continue on a tenancy basis at a monthly rental of Shs. 500/-.

But the letter of October 27, 1959, clearly has another significance. As counsel for the defendant submitted, it appears on the face of it to determine the tenancy assuming that one existed. Counsel for the defendant argued from this that if there were any claim against the defendant for rent accruing due after such determination it could only be a claim for use and occupation, which had neither been pleaded nor proved.

Counsel for the plaintiff’s reply to this was that on the evidence it was clear that the notice to quit had been waived. He relied particularly on the letter written by Mr. Bhanji, which, as I have said, appears to be of little evidential value as against the defendant. In any case, with respect, I think the argument itself lacks merit. In this connection I would quote the words of Lord Goddard in *Clarke v. Grant and Another* (5), when he said:

“If one may say so with respect to the learned deputy judge, he fell into the error of confusing an acceptance of rent after a notice to quit with an acceptance of rent after notice that an act of forfeiture has been committed. If a landlord seeks to recover possession of property on the ground that breach of covenant has entitled him to a forfeiture, it has always been held that acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of covenant as a forfeiture. The lease is voidable, not void, and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby acknowledges or recognizes that the lease is continuing. With regard to the payment of rent after a notice to quit,

however, that result has never followed. If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy.”

In the present case it is common ground that no rent was paid and there is no evidence to suggest, still less prove, any consensus ad idem for a new tenancy.

On the assumption that a monthly tenancy had existed and had been validly determined by notice, a tenant holding over would have been a tenant on sufferance; but if consent of the landlord to the holding over were given, a tenancy at will would be implied. The evidence for the plaintiff company of regular demands for rent, if accepted – and it has not substantially been denied – is, I think, sufficient proof of consent. The fact that no rent was paid prevents the tenancy at will from being transformed in its turn into a periodic tenancy.

These matters are of importance because when rent is sued for under an implied tenancy at will it is necessary for the landlord to prove that the tenant has been in occupation, whereas proof of occupation is not necessary where rent is claimed under an agreement written or oral.

This brings me back to the pleadings, because, as counsel for the defendant pointed out, use and occupation were not pleaded by the plaintiff company. On the other hand, paragraph 5 of the written statement of defence reads:

“The defendant denies that the property in his use and occupation is situated at Plot 14 Market Street, Mafia.”

and paragraph 7 includes the statement that;

“The portion of the said house property on Plot No. 14 Market Street, Mafia . . . is not being used by the defendant . . .”.

Faced with this, learned counsel for the plaintiff company sought leave neither to amend the plaint nor to file a reply to the written statement of defence.

It is always distasteful to decide any issue on technical grounds rather than substantial merits, but the rules of pleading have been evolved in the general interest so that all parties may know the allegations they have to meet and that issues may be framed and justice done without undue delay. It seems to me that having regard to the terms of the plaint, to the fact that leave was not sought to file a reply to the written statement of defence, and to the issues as framed, the defendant was entitled to assume that use and occupation were not in issue. Applying the principles which I earlier attempted to outline I think I must hold that it is not open to me to grant relief based on use and occupation, since that is an allegation of fact of which the defendant had no notice.

In case I am held wrong in this I must now consider the evidence regarding use and occupation, and I may say at once that it is far from satisfactory. Mr. Stanley was asked in direct examination who was occupying the house referred to as item 8 in the documents of title. He replied:

“That is occupied by Saleh Alibhai’s family, i.e. Fazal, Akberali, Akberali’s mother, and numerous brothers, sisters . . . also they have sub-let a part of it to Mafia Produce Dealers Association.”

In cross-examination he was only asked to confirm that the defendant’s brother Fazal had at all material times been in occupation of the house. His reply was that Fazal had been one of many members of the family living in the house,



“perhaps not at the beginning of the relevant period, but certainly for most of it”. Mr. Bhanji in direct examination said that the whole of the house was occupied by the defendant and his family and sub-tenants. In cross-examination it was put to him that the defendant himself was in Dar-es-Salaam, whereupon he replied that the defendant’s family were in occupation and that the defendant himself stayed there when in Mafia. The witness was asked why he referred to the defendant’s family and not to the family of the defendant’s uncle, and he replied that they were all known by the name Saleh Alibhai, that is, the name of the defendant’s grandfather. Curiously, neither of these witnesses was asked how he knew who had been occupying the house.

The defendant denied use and occupation of the building on Plot No. 14 and supported his denial by an allegation that what the plaintiff company regarded as one building, the subject of the tenancy, is really two. He said that his father first built a house on plot No. 14. Later his father erected a building on the adjoining Plot No. 13. The two buildings were connected and there was inter-communication. They were treated as one up to the time of the conveyance to the plaintiff company, but thereafter the family of the defendant vacated the building which had been conveyed and lived only in the building on Plot No. 13. As regards the building on Plot No. 14, he said that there was an office downstairs occupied rent free by Mafia Traders Co-operative Ltd. since his father’s time. The upstairs part of the building was unoccupied.

One of the many unsatisfactory features of this case was that neither party produced any plan of the properties in question or any expert evidence. Mr. Stanley frankly admitted that he did not know whether or not the building in question was partly on one plot and partly on the other, and the plaintiff company produced no evidence on this subject although it had been given notice of the allegation in the written statement of defence. The defendant’s evidence was little better. He produced no evidence of title to Plot No. 13 (other than a demand for ground rent, which is neither evidence of title nor unequivocally related to the land in question). He made no attempt to define the boundaries of the plots or to explain how he knew where the boundary was. He was not cross-examined on these matters.

I did not find the defendant very convincing on the issue of use and occupation. He certainly contradicted himself on one matter, stating first that from the time the building was erected on Plot No. 13 none of his family occupied the house on Plot No. 14, but later conceding, when the documents of title had been put to him, that his family sometimes used the house on Plot No. 14 up to the time of the conveyance. I find it curious that no real foundation for his evidence was laid in the cross-examination of Mr. Stanley and Mr. Bhanji. Furthermore, it is difficult to see how the defendant could testify of his own knowledge that no-one in his family ever used the building on Plot No. 14 when according to his own evidence the two buildings were regarded as one and he himself was generally resident in Dar-es-Salaam. In fairness I must add that he was not cross-examined on this question.

On balance I think the evidence regarding use and occupation, unsatisfactory as it is, favours the plaintiff company. This is particularly so in relation to the office occupied by the Mafia Traders Co-operative Ltd. The co-operative had been put into occupation by the defendant’s father and appears to have continued in occupation as sub-tenants after the conveyance of the property. It was therefore the duty of the defendant, if he really intended to vacate the premises, to ensure that the co-operative vacated its office, unless the plaintiff company accepted the co-operative as its tenant, and there was no evidence of any such acceptance. As Lord Kenyon said in *Harding v. Crethorn* (6):

“When a lease is expired, the tenant’s responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term.”

Had I not felt precluded from doing so by the pleadings I should therefore have held that the plaintiff company was entitled to recover rent from the defendant as a tenant holding over with consent and remaining in occupation of part at least of the premises.

I should perhaps deal with one further related point, which was not raised in argument but was I think implicit in the cross-examination of the plaintiff company’s witnesses. If there was a contractual relationship of landlord and tenant which was determined by the letter of October 27, 1959, the fact that the house may not thereafter have been occupied by the defendant himself is not material if it was occupied by members of his family. Authority for this is to be found in *Christy v. Tancred, Finley and Others* (7). In that case four persons had a contractual tenancy after the termination of which two of them held over while negotiations, which came to nothing, were conducted for a new agreement. Parke, B. said:

“It is clear that the original parties to this agreement continued liable for the rent as tenants holding over, unless there was a new agreement by the landlord to accept other persons as his tenants in their stead . . . But there is no evidence of any agreement to accept any particular persons on any defined terms, or of any complete bargain at all, but only of a proposal for a tenancy on certain terms, which never came to anything more. It is therefore the simple case of the lessees holding over by their undertenants, and consequently they continue liable.”

Another argument was raised by counsel for the defendant with which I will deal briefly. He submitted that, even if there was an agreement for a tenancy, which he denied, it was void for uncertainty, since it is not clear how much of the building is owned and could be let by the plaintiff company. With respect, I do not think there is any merit in that argument. It is clear that if there was a letting, it was of the building previously sold to the plaintiff company, when the defendant acted as one of the vendors, in a representative capacity, and as attorney of the other. There is no question of any third party rights and it is not suggested that any part of the house sold to the plaintiff company was excluded from the letting. The evidence does not prove that there was, in fact, any mistake, still less that such a mistake, if there was one, was as to a matter of fact “essential to the contract” within the meaning of s. 20 of the Indian Contract Act, 1872.

Counsel for the plaintiff argued that a tenant is not entitled to challenge his landlord’s title, relying both on s. 116 of the Indian Evidence Act, 1872 and on the general doctrine of estoppel. I do not, however, think that s. 116 avails him because, although the wording of the section appears unqualified, it has been held in India in the case of *Ketu Das v. Surendra Nath Sinha* (8), quoted in Casperez’ Estoppels and the Substantive Law (4th Edn.), at p. 243 (the full report is not available) that the rule only applies when the landlord has let the tenant into possession. It does not apply when the tenant was already in possession. This view, which accords with the English law from which the Act was derived, is also expressed in Woodroffe and Ameer Ali’s Law of Evidence and should, I think, be followed here.

Nor do I think the general doctrine of estoppel applies. Counsel for the plaintiff particularly referred to *Central London Property Trust Ltd. v. High Trees House Ltd.* (9), and the cases which followed it. I confess that I do not see their relevance. The defendant has at the most remained in occupation of a certain

building. He may have made an oral agreement, but if so its terms have not been proved. He has made no acknowledgment in writing and he has paid no rent. I do not see, therefore, how there can be any estoppel as regards what has happened subsequent to the sale of the house. The documents of title certainly estop him from denying that the family of which he is a member were in occupation of the house sold up to the time of the sale, but that he does not deny. In any case, as Bowen, L.J., said in *Low v. Bouverie* (10), (3 Ch., at p. 105):

“Estoppel is only a rule of evidence; you cannot found an action upon estoppel.”

With respect, I think that is what counsel for the plaintiff is seeking to do. The defendant’s case is entirely negative: he denies that there was a tenancy agreement and he denies that there was use and occupation. It was for the plaintiff company to plead and prove one or the other

In view of my decision that an agreement was not proved and that use and occupation, not having been pleaded, could not be proved, the issue regarding the measure of relief does not require to be answered. But I should perhaps deal briefly with it in case it should become material on appeal. The amount claimed in the plaint is Shs. 19,759/75 alleged to be due for rent after giving credit for sums totalling Shs. 142/-. The amount claimed includes rent for a period prior to December 18, 1959, which it is now conceded is barred by limitation. It includes also two items of Shs. 30/80 and Shs. 64/50 which are not explained and were not separately pleaded. Had the plaintiff company succeeded, the amount it could have recovered would appear to have been Shs. 17,583/80 only.

In conclusion I find:

- (1) on the first issue that the agreement as alleged in the plaint was not proved, but that it was established that a tenancy existed until determined by notice to quit given on October 27, 1959;
- (2) on the second issue that at all material times, that is, after the notice to quit had expired, the defendant was a tenant at will if at all, that question depending on whether or not use and occupation was enjoyed;
- (3) on the third issue that use and occupation not having been pleaded the plaintiff company was debarred from proving them and is not entitled to recover any amount by way of rent.

The suit is accordingly dismissed with costs.

*Suit dismissed with costs.*

For the plaintiff:

*RC Kesaria*

*RC Kesaria, Dar-es-Salaam*

For the defendant:

*NA Velji*

*Sayani & Co, Dar-es-Salaam*

**Division:** High Court of Tanganyika at Dar-Es-Salaam  
**Date of judgment:** 10 October 1963  
**Case Number:** 12/1963  
**Before:** Sir Ralph Windham CJ  
**Sourced by:** LawAfrica

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*[1] Slander – Privilege – Words spoken by advocate before licensing authority – Statement made on instructions – Whether occasion privileged.*

*[2] Slander – Qualified privilege – Malice – Words spoken by advocate before licensing authority – Words spoken on client’s instructions – Instructions believed true – Whether express malice proved.*

*[3] Slander – Pleading – Complaint stating that words spoken and published ‘falsely and maliciously’ – Defence of absolute or qualified privilege – No reply alleging express malice – Whether reply alleging malice necessary – Indian Code of Civil Procedure, 1908, O. 19, r. 6.*

### **Editor’s Summary**

The plaintiff company were public transporters and the second plaintiff was a shareholder and managing director of the plaintiff company. The defendant, an advocate representing the owner of a rival transport business, at a public session of a transport licensing authority applied for the renewal of his client’s licence to run a road transport service on a route which was also served by the plaintiff company. The plaintiff company opposed this application. In replying to their objections the defendant stated: “The objector is not such a reliable operator and financially stable. Re reliability, you have the evidence in TA/748. Re financial stability, my instruction is that Hasham Suleman Limited are in debt, do not own any vehicles on their own account, and that the director from whom they take their name, Mr. Hasham Suleman, committed an act of bankruptcy and is an undischarged bankrupt. If Hasham Suleman, an undischarged bankrupt can convert his business into a limited liability, is there any reason why my client who is not bankrupt, discharged or undischarged, be refused to do the same?” The application having been rejected, the defendant’s client appealed to the licensing appeal tribunal the record of which included the proceedings before the licensing authority and the particular words used by the defendant. The plaintiffs filed an action for defamation and the defence pleaded, *inter alia*, absolute privilege or, alternatively, qualified privilege. At the trial the defendant admitted having said most of the words attributed to him and that, in view of information he had just received, they were defamatory. The main issues at the hearing were whether the occasion was one of absolute or qualified privilege; if the latter, whether the plaintiffs had succeeded in proving express malice and whether the plaintiffs had to plead express malice.

### **Held –**

- (i) the defamatory words spoken by the defendant were uttered, and later recorded and distributed, in circumstances entitling them to qualified privilege;
- (ii) the defamatory words spoken by the defendant were appropriate and relevant to the occasion and the plaintiffs had failed to prove that they were spoken with express malice;

- (iii) it was not necessary for the plaintiffs to plead express malice in their reply; their allegation of malice in the plaint being sufficient to entitle them to prove it upon the defamatory words being shown to have been uttered on an occasion of qualified privilege: *Smith v. Lewis* (6) applied.

Judgment for the defendant.

### Cases referred to in judgment:

- (1) *Dawkins v. Lord Rokeby* (1875), L.R. 7 H.L. 744.
- (2) *Royal Aquarium v. Parkinson*, [1892] 1 Q.B. 431.
- (3) *Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. 405.
- (4) *Attwood v. Chapman*, [1914] 3 K.B. 275.
- (5) *Addis v. Crocker*, [1960] 2 All E.R. 629.
- (6) *Smith v. Lewis* (1917), 33 T.L.R. 195.
- (7) *Clark v. Molyneux* (1877), 3 Q.B. 237.

### Judgment

**Sir Ralph Windham CJ:** The second plaintiff is a shareholder in, and managing director of, the first plaintiff company. The plaintiffs carry on business as public transporters in Tanganyika at Tanga and elsewhere. The defendant is an advocate of this court. At a public session of the Transport Licensing Authority held in Dar-es-Salaam on March 27, 1962, the defendant, representing the proprietor of a rival public transport business known as Dar-es-Salaam Transport Service, applied for the renewal of his client's licence to run a road transport service between Dar-es-Salaam and Mombasa, a route over which the plaintiffs were already licensed to run a service. The plaintiffs, at the hearing, objected to the renewal of their rivals' licence. In replying orally to their objection the defendant is alleged to have used defamatory words about the plaintiffs which are the subject of the present action for defamation. The defendant's client lost his application for a renewal of licence before the Transport Licensing Authority, and the appeal which he thereupon lodged with the Transport Licensing Appeal Tribunal under the Transport Licensing Ordinance (Cap. 373) and Regulations was likewise dismissed. For the purpose of the appeal a record of the proceedings before the Licensing Authority, including the defamatory words allegedly uttered by the defendant was placed before each member of the Appeal Tribunal.

According to paragraph 4 of the plaint the defamatory words spoken by the defendant about the plaintiff objectors, which touched on their financial stability in relation to their business and which would thus be actionable without proof of special damage, were the following:

"The objector is not such a reliable operator and financially stable. Re reliability, you have the evidence in T.A./748. Re financial stability, my instruction is that Hasham Suleman Limited are in debt, do not own any vehicles on their own account, and that the director from whom they take their name, Mr. Hasham Suleman, committed an act of Bankruptcy and is an undischarged bankrupt.

If Hasham Suleman, an undischarged bankrupt can convert his business into a limited liability, is there any reason why my client who is not bankrupt, discharged or undischarged be refused to do the same?"

In his written statement of defence the defendant, after putting the plaintiffs to proof of the words uttered, pleaded the three alternative defences of justification, absolute privilege and qualified privilege. During the course of the trial, by reason of there having just come to his knowledge the incorrectness of his statements on March 27, 1962, that the second plaintiff was on that date an undischarged bankrupt, the defendant virtually abandoned the defence of justification, and relied on absolute privilege or alternatively qualified privilege. It is conceded that, subject to these defences, the words used were

defamatory. The plaintiffs, through their advocate, have denied that the occasion was absolutely privileged, but concede that it was qualifiedly privileged, maintaining however that the

words were uttered with express malice and that they were therefore not protected.

The issues have accordingly narrowed from what it appeared that they might be at the outset of the trial; and, as I see it, they now present themselves as the following. First, were the defamatory words, or the substance of them, uttered at all? Secondly, if they were uttered, was the occasion absolutely privileged? Thirdly, if it was not, and it being conceded that the occasion was at least qualifiedly privileged, can the plaintiffs be allowed to plead and prove that the words were uttered with express malice, in view of the fact that they have not specifically pleaded express malice? Fourthly, if they can be so allowed, were the words uttered with express malice? Lastly, and this issue will only arise if express malice is proved, what damages should be awarded?

The evidence going to establish that the defendant did utter the defamatory words on the occasion alleged was that of a Mr. K. M. Jiwa, who was the Dar-es-Salaam manager of the first plaintiff company, that of Mr. Awtar Singh, an advocate of this court who was representing the plaintiff-objectors both before the Licensing Authority and later before the Appeal Tribunal, and that of the defendant himself who substantially admitted to having made all the allegations of fact alleged. In fact the defendant in giving his evidence said: "In paragraph 4 of the plaint, the first eight lines are a fair representation of what I said"; that is to say, up to and including the words – "and is an undischarged bankrupt". He went on to say: "I have no recollection of saying the last six lines", that is to say the words – "If Hasham Suleman, an undischarged bankrupt, can convert his business into a limited liability, is there any reason why my client, who is not a bankrupt, discharged or undischarged, be refused to do the same?" But apart from a repetition of the allegation that the second plaintiff was an undischarged bankrupt, which the defendant admits to having made, these words are not defamatory, since they make no statement of fact but merely pose a question by way of argument. In short, the defendant admits having said everything that he is alleged to have said which is of a defamatory nature, and he admits having said it on the occasion alleged.

The next point for decision is whether that occasion was absolutely privileged; I am now referring to the proceedings both before the Transport Licensing Authority, where the words were spoken, and before the Transport Licensing Appeal Tribunal, where the words were later distributed in written form. The legal position is in my view the same in respect of both proceedings, as touching the question whether they were quasi-judicial.

The general proposition that defamatory words uttered in quasi-judicial proceedings, as well as in judicial proceedings properly so-called, are absolutely privileged was affirmed by the House of Lords in *Dawkins v. Lord Rokeby* (1). But the principles on which a court will decide whether proceedings are quasi-judicial were first enunciated in *Royal Aquarium v. Parkinson* (2), and they have been followed since.

One of the recognized pre-requisites to a tribunal being considered quasi-judicial for the purpose of absolute privilege is that its procedure shall be regulated and shall bear at least some resemblance to the procedure in a court of law. This was made clear in *Copartnership Farms v. Harvey-Smith* (3), where the procedure in the military tribunal that was the subject of that case did pass this test, and where statements in the tribunal were held to be absolutely privileged. Turning to the present case, the procedure prescribed for the Transport Licensing Authority is laid down both in the Transport Licensing Ordinance, 1957, itself and in the Transport Licensing Regulations, 1957; while the procedure for the Transport Licensing Appeal Tribunal is laid down in the Transport Licensing (Appeal) Regulations, 1957. The procedure so laid down bears very close



resemblance to that obtaining in a regular court of law, and to my mind it clearly passes this particular test of whether the proceedings, both before the Authority and before the Appeal Tribunal, could be considered as quasi-judicial.

But, as I read the authorities, that is not the only test that must be satisfied. An equally important test would seem to be the functions of the tribunal in question. If they are judicial, then the tribunal may be considered as quasi-judicial. If they are only administrative, it may not. Even as early as *Royal Aquarium v. Parkinson* (2), this distinction was recognized. The tribunal in that case was the London County Council, meeting for the purpose of granting or refusing music and dancing licences. It was held that the County Council, when sitting for that purpose, was not a court or tribunal in which a defamatory statement was absolutely privileged, but that the privilege was qualified only. Lord Esher, M.R., said speaking of the doctrine of absolute immunity ([1892] 1 Q.B., at pp. 442, 443):

“This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act. Then can it be said that a meeting of the county council, when engaged in considering applications for licences for music and dancing, is such a tribunal?

... In the case of duties properly administrative, such as that of granting licences, their action was consultative, for the purpose of administration, and not judicial. . . . That consideration also appears to me to show that the case does not come within the doctrine of absolute immunity applicable to tribunals similar to courts of justice.”

It has been pointed out by learned counsel for the defendant that nowhere in the judgments in *Royal Aquarium v. Parkinson* (2) is it laid down categorically that no tribunal whose function is the granting or refusal of licenses can be considered as quasi-judicial for the purpose of absolute privilege. That is true. But this seems to have been assumed, both in that case and later. To begin with, there appears to be no reported case in which such a tribunal has been held to be quasi-judicial for that purpose. This in itself, of course, is not conclusive. But in *Attwood v. Chapman* (4) it was held that licensing justices sitting to consider the renewal of liquor licences did not constitute a tribunal before which a defamatory statement would be entitled to absolute privilege. The judgment in that case does not set out the ratio decidendi very clearly; but one thing is clear, namely that the decision was reached notwithstanding that the procedure to be observed by that tribunal, as laid down in the Licensing (Consolidation) Act, 1910, was quite as judicial as, indeed was nearly identical with, the procedure laid down for observance by the Transport Licensing Authority and by the Transport Licensing Appeal Tribunal in the present case, to which I have earlier referred.

The proposition that licensing tribunals in general, and road transport licensing tribunals in particular, are not quasi-judicial tribunals for the purpose of the operation of the rule of absolute privilege because their functions are administrative rather than judicial, is one which appears to have been clearly recognized in England by the Committee appointed by the Lord Chancellor in 1955 to report on Administrative Tribunals and Enquiries. The Committee's Report was published in 1957 (Command Paper No. 218), and an outcome of it was the Tribunals and Inquiries Act, 1958. Among the particular tribunals considered by the Committee (see Chapter 17 of their Report) were the Licensing Authorities for Public Service Vehicles and Goods Vehicles and the Transport Tribunal, the exact counterparts under the Road and Rail Traffic Act, 1933, of the Authority and Appeal Tribunal that are the subject-matter of the present action, in respect both of their functions and of the quasi-legal procedure prescribed for the exercise of them. In considering the question of privilege in connection with these and other tribunals, the Committee wrote this, in paragraph 82 of their Report:

“82. If the general rule is to be that tribunals should conduct their business in public, consideration should be given the position of witness who give evidence before them. A witness who gives evidence in a court of law cannot be sued in respect of something he has said in his evidence. He enjoys absolute privilege. A witness before a tribunal does not enjoy the same degree of protection. If he is sued he can rely on the defence of a qualified privilege, which will probably succeed in most cases, but he may be put to considerable expense in establishing the defence. Absolute privilege has long been considered necessary to the administration of justice in the courts, and there is a strong case for saying that it is equally necessary for tribunals – at any rate in those case where evidence is given on oath.”

Of the above passage I need do no more than observe that, in recommending that absolute privilege should be extended to such tribunals as we are now considering, the Committee recognized that under the existing law they were not already entitled to it, but only to qualified privilege. Indeed the Committee expressly said so. Such, as I see it, is the legal position in Tanganyika today, as it still is in England so far as I am aware. It only remains to observe that, though the views of the Committee on Administrative Tribunals and Enquiries are not binding on this court, the Committee comprised a leaven of the most eminent English jurists, whose opinions are entitled at least to the greatest respect.

Finally, the Court of Appeal in *Addis v. Crocker* (5), in holding that proceedings before the disciplinary committee established under the Solicitors Act, 1957, were entitled to the benefit of absolute privilege by reason of the judicial nature of that committee’s functions, drew the same distinction between functions of that nature, where the status of a person is involved, and administrative functions such as the granting of licences; for they observed, per Hodson, L.J. ([1960] 2 All E.R., at p. 636):

“The functions are judicial functions, not administrative functions. This is not comparable with a meeting concerned with the issue of licences.”

For these reasons I hold that the defamatory words spoken by the defendant in the present case were uttered, and later recorded and distributed, in circumstances entitling them to qualified privilege. It remains therefore to see whether the plaintiffs can show that they were spoken with express malice, after first deciding whether upon the pleading they are entitled to rely on express malice.

In brief, the position upon the pleading was that in paragraph 4 of their plaint the plaintiffs averred that the defamatory words were spoken and published “falsely and maliciously”; that in paragraph 5 of his written statement of defence the defendant pleaded that if the words were published, they were “published on an occasion or occasions of absolute privilege, or alternatively qualified privilege”; and that the plaintiffs filed no reply alleging express malice, nor indeed any reply at all.

Now the position in England today with regard to the necessity of pleading express malice in reply to a defence of qualified privilege is clear, for it is covered by the proviso to Order 19, r. 22 of the Rules of the Supreme Court. The proviso was enacted in 1949, and it requires that:

“where in an action for libel or slander the defendant pleads that any of the words or matters complained of are fair comment on a matter of public interest or were published upon a privileged occasion, the plaintiff shall, if he intends to allege that the defendant was actuated by express malice, deliver a reply giving particulars of the facts and matters from which such malice is to be inferred.”

There is in Tanganyika no provision corresponding to the English proviso

to Order 19, r. 22; and the position here is what it was in England before 1949. For the relevant provision in England then was Order 19, r. 22, without the proviso, which is identical with Order 6, r. 10 of the Indian Code of Civil Procedure. Both provide that:

“Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.”

This provision appears to leave open the question whether, in a suit for defamation, an allegation in the plaint that the words were spoken or published maliciously is sufficient to import an allegation of express malice in the event of the defendant pleading qualified privilege, or whether in such an event the plaintiff must go on specifically to plead express malice in a reply. But there is English authority that, under the English Order 19, r. 22 before the enactment of its proviso, a general allegation of malice in the plaint was sufficient for the purpose. I refer to *Smith v. Lewis* (6), in which Shearman, J., after referring to the existing uncertainty of the law on the point, which had now come directly before him for decision, laid down that in his opinion:

“... it was not necessary in such a case for the plaintiff to plead malice in his reply, to enable the issue of malice to be raised. There was an allegation of malice in the statement of claim, and since privilege was pleaded the particular issue of malice was defined. The defendant could have got any particulars of the malice which were necessary on the pleadings as they stood, because by the defence of privilege the allegation of malice in the statement of claim became not merely a nominal but an effectual issue.”

That decision is right in point, the position on the pleadings being the same; and I hold, following it, that in the present case it was not necessary for the plaintiff to plead express malice in a reply, their allegation of malice in the plaint being sufficient to entitle them to prove it, upon the defamatory words being shown to have been uttered on a qualifiedly privileged occasion.

This brings me to the question whether the plaintiffs have succeeded in proving express malice on the defendant's part. For this purpose the plaintiffs must show that in uttering the defamatory words the defendant either knew them to be untrue, or was actuated by spite or anger or unreasoning prejudice, or by some indirect motive inappropriate or irrelevant to the occasion.

To deal with the last point first; I am satisfied that the defamatory words spoken by the defendant were appropriate and relevant to the occasion, namely in answer to the plaintiffs' opposition to his client's application for a renewal of his road transport licence. What the defendant was in effect saying about the second plaintiff was: “It ill behoves him to object to my client's being granted a licence on the ground that my client is financially unstable, when he himself holds a licence notwithstanding that he himself is financially unstable.” The retort of “tu quoque” may not have been a logical answer to the objection, since two wrongs do not make a right; but I cannot hold that it was an irrelevant one. The defendant was simply pointing out to the Licensing Authority that they ought not to consider the applicant's unstable financial position as a fatal barrier to his holding a licence, having in view the fact they had not considered the objector's similar unstable financial position to be fatal to the objector's own holding of a licence. I think that such a submission was entirely germane to the application.

Nor have the plaintiffs shown that when the defendant said of the first plaintiff company that it was “in debt” and did not own any vehicles on its own account,

or of its managing director the second plaintiff that he was an undischarged bankrupt, he knew that he was saying what was not true. I accept the evidence of the defendant that he said these things upon his client's instructions, believing them to be true. The defendant might of course have checked up on the accuracy of these assertions before repeating them. But his failure to do so at that juncture amounted, at the most, to no more than imprudence, and fell short of malice. If a defendant honestly believes his statement to be true, omission to make inquiry or to verify is not of itself evidence of malice: vide *Clark v. Molyneux* (7), and other cases cited in *Gatley on Libel and Slander* (5th Edn.), at p. 572. With regard to the defendant's allegation that the second plaintiff was an undischarged bankrupt on March 27, 1962, when the allegation was made, I accept the defendant's evidence that his client, in so instructing him, said that he (the client) had verified it from the Official Receiver's office. Indeed the defendant, after the filing of the plaint, himself went to the Official Receiver's office, and he has testified, his evidence being wholly corroborated by that of the official of that office, Mr. Anantani, whom he interviewed, that he was informed by Mr. Anantani, after they had looked at the relevant entries in the Register, that the second plaintiff had been adjudicated bankrupt in 1930, that he had in 1935 been given a conditional discharge, the conditional being his consenting to judgment for Shs. 2,000/-, and that there was no further information as to whether he had later fulfilled the condition and received an absolute discharge. Mr. Anantani himself believed this to be true; and only on the eve of his giving evidence in this case did he discover, upon being again approached by the defendant, that he had overlooked an entry in the Register which showed that the second plaintiff had received his absolute discharge in 1944. I accept the evidence of the defendant that it was only at that moment that he knew that his statement before the Licensing Authority on March 27, 1962, that the second plaintiff was an undischarged bankrupt, was in fact not true.

Upon all the evidence, including that of the defendant himself which I accept, I find that the plaintiffs have failed to prove that the defamatory words spoken by the defendant about them in circumstances entitling those words to qualified privilege, were spoken with express malice. That being so, the plaintiffs' suit must fail, and the question of damages does not arise. The action is dismissed with costs.

*Judgment for the defendant.*

For the plaintiffs:

*RN Donaldson*

*Awtar Singh, Dar-es-Salaam*

For the defendant:

*WD Fraser Murray*

*Fraser Murray, Thornton & Co, Dar-es-Salaam*

**Kassamali Bhogadia v M A Nasser**  
[1963] 1 EA 610 (HCU)

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 24 October 1963

**Case Number:** 412/1961  
**Before:** Bennett J  
**Sourced by:** LawAfrica

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*[1] Distress – Illegal distress – Distress levied by court bailiff – Instructions to levy distress for landlord of residential flat – Distress levied at office premises – Error due to instructions received from advocates – Whether advocates liable to indemnify court bailiff.*

*[2] Damages – Illegal distress – Inventory of goods taken by court bailiff – Goods not removed from premises – Measure of damages.*

### **Editor's Summary**

The third party in these proceedings, a firm of advocates, acting on behalf of the landlord of a flat occupied by the plaintiff, instructed the defendant, a court bailiff, to levy distress for the rent due to the landlord. The third party only gave the plaintiff's office address to the defendant. The defendant accordingly levied distress, not on the goods in the plaintiff's flat, but on the furniture in his office and the plaintiff sued the defendant for damages for a wrongful distress. In levying the distress the defendant merely made an inventory of the office furniture but removed nothing. The defendant claimed indemnity from the third party who entered an appearance but filed no defence and was not represented at the trial of the suit.

### **Held –**

- (i) the defendant's mistake in distraining at the wrong premises was entirely the fault of the third party; accordingly, the third party was liable to indemnify the defendant against the consequences of his wrongful act;
- (ii) the fact that the goods were never taken out of the plaintiff's use was a factor to be taken into account in reduction of damages and Shs. 2,500/- was adequate compensation to the plaintiff for the wrong which he had suffered.

Judgment for the plaintiff. Order that the third party indemnify the defendant.

### **Cases referred to in judgment:**

- (1) *Interoven Stove Co. Ltd. v. Hibbard and Another*, [1936] 1 All E.R. 263.
- (2) *Birmingham District Land Co. v. London and North Western Rail. Co.* (1887), 34 Ch.D. 261.

### **Judgement**

**Bennett J:** The plaintiff is an insurance agent. The defendant is an auctioneer and court bailiff. The third party is a firm of advocates practising in Kampala.

The plaintiff claims damages from the defendant for a wrongful distress alleged to have been levied by the defendant on the chattels of the plaintiff.

The only issue as between the plaintiff and the defendant is the quantum of damages since the defendant now admits that he distrained on the goods of the plaintiff and that the distress was illegal. He claims indemnity against the third party on whose instructions he levied the distress. The third party entered an appearance but filed no written statement of defence, and was not represented at the trial of the suit.

Since an interlocutory order was made that the question of the liability of the third party to indemnify the defendant be tried at the trial of the suit, it was necessary for the defendant to call evidence which was not confined to the issue of damages.

The following facts have been proved to my satisfaction. In 1961 the plaintiff resided at a flat in William Street, Kampala, which he rented from Messrs. Jagjivan Mulji & Bros. Ltd. at a rent of Shs. 425/- a month. From the end of 1959 until November, 1962 the plaintiff carried on business at an office at No. 1 Wilson Street, Kampala, which he rented from another landlord. On February 27, 1961 the third party, acting on behalf of Messrs. Jagjivan Mulji & Bros. Ltd., instructed the defendant to distrain for rent of the flat overdue for the month of February, 1961. The defendant levied distress not on the plaintiff's goods in the flat but on the plaintiff's office furniture in his office at No. 1 Wilson Street. Since the rent of the office was not in arrear, and Jagjivan Mulji & Bros. Ltd. was not the landlord of the office, the distress was plainly illegal. The defendant levied distress in the absence of the plaintiff, but in the presence of two of the plaintiff's clerks and one of the plaintiff's customers, Shabudin Ganji, who was in the office at the time. In levying the distress the defendant merely made an inventory of the office furniture but did not remove it or leave anyone to guard it. The furniture was never at any time removed from the plaintiff's office, and the plaintiff was never deprived of its use.

The plaintiff testified that after the distress his business declined somewhat. Had there been any diminution in the volume of the plaintiff's business following the distress one would have expected this to be reflected in his books of account and in his annual balance sheets, but these were not produced in evidence. The plaintiff was unable to give any particulars of loss of business sustained by him apart from saying that he knew of one potential customer who had refused to place business with him; this customer was not called as a witness. The plaintiff admitted that he did not lose any of his agencies as a result of the distress. Moreover, Ganji who was present when the distress was levied, testified that after the distress he continued to do business with the plaintiff.

The plaintiff has failed to satisfy me that he sustained any actual damage as a result of the distress, but that is not to say that he is not entitled to substantial damages from the defendant. In *Interoven Stove Co. Ltd v. Hibbard and Another* (1) ([1936]) 1 All E.R., at p. 270, Hilbery, J., said:

"An illegal distress has always been a trespass and an action would always lie. (See note to Trespass to Goods, 1868, Bullen & Leake, p. 114.) And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damage sustained, but a right to recover substantial damages even though there be no proof of actual loss. The case of *Bayliss v. Fisher* was cited, and is an authority for that proposition."

The fact that the goods were never taken out of the plaintiff's use is a factor to be taken into account in reduction of damages, but it does not bar the plaintiff's claim: See Mayne & McGregor on Damages (12th Edn.), p. 731. Giving the matter the best consideration that I can, I consider that the sum of Shs. 2,500/- will adequately compensate the plaintiff for the wrong which he has suffered, and I assess damages accordingly.

I now turn to the liability of the third party. The defendant's instructions to levy distress were contained in a letter from the third party dated February 27, 1961, which reads as follows:

“Dear Sirs,

Kassamali Janmohamed – 1 Wilson Street, Kampala, trading as Allied General Agencies

Kindly obtain by distress immediately the sum of Shs. 425/- in respect of rent due and owing to our clients Messrs. Jagjivan Mulji & Bros. Ltd. together with our fees of Shs. 63/- and apply for your fees direct.

We telephoned you this morning but unfortunately you were not available. Kindly treat this matter as urgent.”

Anyone not possessed of a full knowledge of the facts who read the letter would understand it to mean, as the defendant did so understand it, that distress was to be levied on the plaintiff’s effects at No. 1 Wilson Street, Kampala, since no other address was given. The defendant was enjoined to treat the matter as urgent, so that he can hardly be blamed for failing to make enquiries of his own before carrying out the instructions contained in the letter. The defendant’s mistake in distraining at the wrong premises was entirely the fault of the third party, and in these circumstances the third party is liable, in my judgment, to indemnify the defendant against the consequences of his wrongful act. As was said by Cotton, L.J., in *Birmingham District Land Company v. London and North Western Rail. Co.* (2) (34 Ch.D., at p. 271):

“Of course if A requests B to do a thing for him, and B in consequence of doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A to indemnify B from the consequences of his doing it. In that case there is not an express but an implied contract to indemnify the party for doing what he does at the request of the other.”

Accordingly, I hold that the third party is liable to indemnify the defendant.

There will be judgment for the plaintiff against the defendant for Shs. 2,500/-. There will be judgment for the defendant against the third party, who is ordered to indemnify the defendant against the damages and costs which he will be required to pay to the plaintiff and against the costs which the defendant has incurred in defending the suit.

*Judgment for the plaintiff. Order that third party indemnify the defendant.*

For the plaintiff:

*AI James*

*Hunter & Greig, Kampala*

For the defendant:

*SH Dalal*

*Hague, Dalal & Singh, Kampala*

The third party did not appear and was not represented.

**Budai Coffee Hulling Factory Ltd v Eria M Babumba**  
[1963] 1 EA 613 (HCU)

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 10 July 1963



**Case Number:** 61/1963  
**Before:** Jones J  
**Sourced by:** LawAfrica

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[1] *Practice – Plaintiff – Summary procedure – Claim for mesne profits and vacant possession of premises – Whether plaintiff correctly endorsed for summary procedure – Civil Procedure Rules, O.XXXIII (U.).*

### **Editor's Summary**

The plaintiff filed a plaintiff specially endorsed for summary procedure under O.XXXIII of the Civil Procedure Rules claiming vacant possession of certain premises and mesne profits from December 1, 1962 until possession. The defendant was granted unconditional leave to defend and at the hearing of the suit raised a preliminary point that O.XXXIII was not applicable as the action was for the recovery of premises and not land, and that possession could not be recovered by summary procedure as O.XXXIII, r. 2 deals with the recovery of a debt arising out of actions for the recovery of land.

### **Held –**

- (i) under O.XXXIII, r. 2 only debts or liquidated amounts arising out of an action for the recovery of land are recoverable and permissible under that Order and not possession of the land;
- (ii) since the amount claimed in respect of mesne profits was unliquidated summary procedure was not applicable and the plaintiff should be struck out.

Order accordingly.

### **Case referred to:**

*Uganda Transport Co. Ltd. v. Count de la Pasture* (1954), 21 E.A.C.A. 163.

### **Judgement**

**Jones J:** This was a suit which came up for hearing under Summary Procedure Order XXXIII. The defendant was given unconditional leave to defend on March 26, 1963, and a written statement of defence was filed.

The plaintiffs were registered proprietors of Plot 37, Kampala Road, Masaka. The defendant occupied one part of the premises, namely shop No. 4 in this building, where he had a surgery and carried on his practice. It was a monthly tenancy from January 1, 1962, created under a tenancy agreement executed on December 30, 1960, expiring on December 31, 1961. The defendant seems to have held over, and on November 1, 1962, and November 29, 1962, letters were sent by the plaintiff's advocates demanding vacant possession.

This was a claim to recover (1) mesne profits from December 1, 1962, to the date when possession is delivered; (2) vacant possession of the premises; (3) costs.

Counsel for the defendant raised a preliminary point: (1) that this court had no jurisdiction as it was a matter which ought to have been dealt with and could only have been dealt with by the District Court

under s. 11 (1) of the Civil Procedure Ordinance as the value of the suit was under Shs. 2,000/-; (2) action was the recovery of premises and not land under Order XXXIII, r. 2 (e); (3) furthermore, possession could not be recovered by summary procedure, as Order XXXIII, r. 2 deals with the *recovery of a debt arising out of actions* for the recovery of land.

As to point (1), the High Court has jurisdiction to try any civil case. Section 11 (1) of the Civil Procedure Ordinance qualifies the powers of a subordinate court.

In support of his second and third points, counsel for the defendant cited *Uganda Transport Co. Ltd. v. Count de la Pasture* (1). The facts, as presented in the headnote, were as follows:

“The plaintiff/respondent sued the defendant/appellant for salary and allowances alleged to be due to him for unliquidated damages, irregularly presenting his plaint under Order 33 aforesaid endorsed for summary procedure instead of presenting it under Orders 4 and 5 aforesaid.

The day following an application by the defendants for leave to appear and defend the suit, the plaintiff filed, without leave, an amended plaint.

Order 33 (2) aforesaid only allows summary procedure for the recovery of land by a landlord or for recovery of a ‘debt or liquidated demand in money payable by the defendant, with or without interest arising . . . upon a contract’ or in other specified ways.

By Order 6, rule 19, aforesaid: ‘a plaintiff may without leave amend his plaint once at any time within 21 days from the date specified in the summons for the appearance of or the entering of an appearance by the defendant; . . .’ ”

There was no claim for the recovery of land in the *Pasture* case (1), but it would appear from an obiter dictum of Briggs, J.A. (21 E.A.C.A., at p. 165), that actions for the recovery of land can be brought by summary procedure. As this was a mere obiter dictum and not necessary to decide the case, I am not bound by it.

Order XXXIII differs in my view from Order 3, r.6 of the R.S.C. in that, in the latter, there is a provision for actions for the recovery of land, whereas in Uganda where the Civil Procedure Rules apply, Order XXXIII is applicable, where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, arising: (a) on contract; (b) on bond or contract for liquidated amount; (c) on guarantee; (d) on trust; (e) in actions for the recovery of land.

As I read it, Order XXXIII, r. 2 says that only debts or liquidated amounts arising out of an action for the recovery of land are recoverable and permissible under that order and not possession of that land.

Sir Newnham Worley in the *Pasture* case (ibid., at p. 168) said:

“... I think it useful also, in support of the proposition that there is no discretion to allow a claim to be brought by summary procedure, if it is not precisely within the terms of Order XXXIII, rule 2, to cite the following from the judgment of Lord Esher, M.R., in *Wilks v. Wood* at p. 686: ‘All I can say is that the word “only” in the rule means “only”, and that if anything else is added to the liquidated demand, the writ does not come within the definition of a specially endorsed writ’.”

If my view is correct, the plaint, when it seeks to recover possession, has been incorrectly endorsed. The question whether a tenancy of one room or shop in a building is land within the meaning of the Interpretation and Claims Act does not matter.

Counsel for the plaintiff argued that counsel for the defendant has waived his right to have the plaint struck out by taking a step without objection, relying on *Uganda Transport Co. Ltd. v. Count de la Pasture* (1) cited above. That, in my opinion, is the correct interpretation to place on that judgment, and counsel for the defendant ought to have raised that point when moving the court for leave to appear and defend. He did not, and indeed filed his defence, which is a positive step in the action thereafter.

But the matter does not end there. It now becomes necessary for me to consider whether this case can

proceed in respect of that part of the plaint which is

not repugnant under summary procedure, by virtue of the ruling enunciated in heading (3) of the decision in *Uganda Transport Co. Ltd. v. Count de la Pasture* (1), which reads:

“(3) Where a plaint endorsed for summary procedure contains claims correctly endorsed and other claims, the court may, by Order 33, rules 3 to 7 and rule 10, deal with the claims correctly specially endorsed as if no other claim had been included therein and allow the action to proceed as respects the residue of the claim, the court having no power under Order 33 to strike out any part of the claim but being unable to give summary judgment for any relief not within the scope of Order 33, rule 2, aforesaid.”

The only remaining claim is for: “(a) Payment of Shs. 375/- per month as mesne profit from December 1, 1962, till vacant possession of the said premises is delivered.”

I doubt, having regard to the definition of mesne profits –

“ ‘mesne profits’ of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession,”

whether that is a debt or a liquidated demand within the meaning of Order XXXIII, r. 2. “What are the profits which the defendant *receives* or might have received therefrom with ordinary diligence?” That predicates that the defendant did receive rent from this shop. They are an unascertained amount.

Furthermore, as the claim was for profits until vacant possession is delivered presumably under section (b) of the plaint, which is being struck out, the amount claimed is clearly unliquidated.

This plaint is therefore bad. It is not applicable to summary procedure, and I order that it be struck out, with costs to the defendant.

*Order accordingly.*

For the plaintiff:

*VM Patel*

*VM Patel*, Kampala

For the defendant:

*JW Kazzora*

*JW Kazzora*, Kampala

## **Joy Octavia Hunting v Kenneth Malcom Hunting** [1963] 1 EA 616 (SCK)

**Division:** HM Supreme Court of Kenya at Nairobi

**Date of judgment:** 6 November 1963

**Case Number:** 46/1962

**Before:** Connell J

**Sourced by:** LawAfrica

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*[1] Divorce – Maintenance – Lump sum paid by husband to wife – Contemporaneous undertaking by wife not to claim alimony and maintenance – Application by wife for maintenance – Whether mode of expenditure of lump sum relevant.*

### **Editor's Summary**

In November, 1960, the petitioner, in consideration of £1920 then paid to her by the respondent agreed in writing that she had no further claims upon her husband on account of alimony and maintenance. About two years later the petitioner applied for maintenance and in an affidavit filed in support stated that the respondent had paid her no sum whatever since 1960. The respondent's affidavit in reply referred to the payment by him of £1920 in 1960 whereupon the petitioner filed a further affidavit setting out how this sum had been spent by her. On a preliminary point the court ruled that the petitioner was entitled to pursue her application. When the application was heard it was submitted for the respondent that although the petitioner was not debarred from claiming maintenance at some future time, she was not entitled to any maintenance then, because the amount paid by the husband was to be regarded as in the nature of maintenance, and that the petitioner was under a duty either to invest that amount or utilise it as if it was a payment of maintenance. For the petitioner it was argued that the mode of expenditure of the £1920 was irrelevant.

### **Held –**

- (i) the court was entitled to go into matters relating to the expenditure of the £1920 and the court was satisfied that the major part of that sum had been “frittered away” unnecessarily;
  - (ii) upon the facts of the case, it would be wrong and inequitable to make an order for maintenance.
- Application dismissed.

### **Cases referred to in judgment:**

- (1) *Hyman v. Hyman*, [1929] A.C. 607.
- (2) *Bennett v. Bennett*, [1952] 1 All E.R. 413.

### **Judgement**

**Connell J:** On November 12, 1962, the petitioner filed a summons and affidavit requesting payment of maintenance by the respondent, resident in England. In that affidavit she stated at para. 6 “the respondent has paid me no sum whatever since November, 1960”. The decree absolute was granted to the petitioner on January 5, 1963.

After further affidavits filed by the respondent and the petitioner the summons came up before me and I was asked to give a preliminary ruling as to whether an undertaking given by the petitioner in November 8, 1960 (annexed in file), in consideration of her having received a sum of £1920 from the respondent to the effect that she has no further claims upon her husband on account of alimony etc., is binding on the petitioner and prevents her from pursuing her claim to maintenance.

On February 25, 1963, I ruled on the authority of *Hyman v. Hyman* (1) and *Bennett v. Bennett* (2) that the undertaking did not prevent her from pursuing

her claim to maintenance. In the course of my ruling I quoted from a passage in the speech of Lord Hailsham, L.C. ([1929] A.C., at pp. 608 – 609) where he said:

“The fact that the deed of separation has been entered into by both parties . . . the fact that the wife was prepared to accept the provision then made as adequate at the time, the benefits which she obtained . . . in the continuance of weekly payments, all form part of that conduct of the parties which by the express terms of the statute is to be taken into account by the court in determining what it thinks reasonable.”

What I did not quote in my ruling, as it was not at that stage relevant – I had not been taken through the affidavits in detail in one particular aspect – was the next passage in Lord Hailsham’s speech which was this:

“It may very well be that when the facts come to be investigated, the court will say that a sum of this magnitude, so secured, voluntarily accepted as a sufficient maintenance 10 years ago, and faithfully paid ever since, is a sufficient provision, that the court will not deem it to be reasonable to order any further payment to be made; that is not the question which your Lordships are considering.”

Further down the same page (*ibid.*, p. 609) occurs this passage:

“This by no means implies that, when the application is made, the existence of the deed or its terms are not most relevant factors for consideration by the court in reaching its decision.”

The decision of course means the decision of the court as to whether maintenance should or should not be granted, or if it is granted, how much and so on.

Counsel for the respondent strongly contends that maintenance should not be granted. He submits first that the petitioner was not frank with the court when she stated the respondent had paid her nothing since November, 1960. It was left to him (counsel for the respondent) and the respondent to make “full discovery” of the agreement between the petitioner and the respondent in 1960 whereby the petitioner was handed over £1920 by the respondent and acknowledged she had no further claims. Secondly, says counsel for the respondent, though the agreement cannot shut out the petitioner from claiming maintenance at some time future to the agreement it was manifest that by and under the agreement the payment made by the husband should at any rate be regarded as a payment in the nature of maintenance and the petitioner was at the very least under a duty either to invest those sums or utilise them as if they were a payment of maintenance; if she had so invested even £1500 at 6 per cent., a not difficult matter in East Africa, or even in interest free securities outside Africa, she could have got something like £100 per annum as a permanent investment in addition to her earned salary. For that matter, as I find, even if she had drawn say £200 per annum out of the £1920, as capital she would have a very considerable supplement to her salaried income over a period of nearly 10 years following the agreement of September (or thereabouts) in 1960.

Counsel for the applicant argued that what she did with the £1920 was irrelevant. With respect I must entirely disagree with that contention. In my judgment the court was fully entitled to go into matters relating to the expenditure of the said sum. Suppose for instance she was called on suddenly to advance a large sum for some clearly legitimate purpose and for some purpose she was bound in law to pay through no negligence or default of her own, would not that be a matter for the court to take into consideration when considering an application for maintenance? Now I have perused the applicant-petitioner’s

affidavits, particularly that of July 24, 1963, in which she gives a statement of how she spent the £1920, or most of it, within the next two years after the money was deposited.

To my mind that expenditure for the most part discloses a serious breach of responsibility, if not breach of duty, which duty in my view arose from the very terms of the agreement she entered into in 1960, that primary duty being to allocate a certain sum per annum by way of what was clearly intended to be a proper contribution towards her upkeep over at any rate a period of years.

To ask the court, under those circumstances and at this stage, as she is doing, to increase or rather fix permanent maintenance at £200 per annum or for that matter at all is to my mind very nearly an abuse of process of court.

Turning again to the speech of Lord Hailsham in *Hyman v. Hyman* (ibid., at p. 608), he says:

“But your Lordships are not now being invited to consider whether the provision in the deed of separation is adequate.”

Lord Atkin, also dealing with the same point says (ibid., at p. 629):

“The wife’s right to future maintenance is a matter of public concern, which she cannot barter away, that is not to say that in any particular case the court *must* [I emphasise the word must] make an order; still less that in this case it must do so.”

He continues:

“I could well understand the court coming to the conclusion that the parties’ pre-estimate of the wife’s reasonable needs was judicious and that the allowance, continuing as it does after the husband’s decease . . . needed no supplement”.

I have certainly had regard to what I may term the “medical aspect” referred to in the petitioner’s affidavit, lest it be thought I have not considered matters which may be said to tell in favour of the petitioner; I have also considered the income tax aspect. But I feel it my duty to say that any reasonable person with a reasonable sense of responsibility should and would have made an ample provision for past expenses under those heads out of the sum provided, £1920 in 1960. On the material before me I find that the major part of that sum has been “frittered away” unnecessarily.

I do not wish to say anything further at this present juncture in case it be found necessary that the petitioner (as she stated would be the case) had to enter hospital in the near future. Facts might then arise at a future stage when the court could legitimately be asked to rule on a fresh state of affairs.

At the present juncture I am quite satisfied on the material before me that it would be wrong and inequitable in all the circumstances to pass any order for maintenance and I dismiss the application.

Both learned counsel argued strongly on costs, should I pass such an order as I have passed. I have no doubt as to the proper order I should pass on this aspect, after I have refreshed my memory from the law and practice which is set out in para. 31 at p. 647 of *Rayden on Divorce* (8th Edn.). It is there stated:

“Although the power of the court to order a wife to pay her husband’s costs is unfettered, it is not the practice of the court to do so unless she has sufficient separate means to pay them.”

Now if one looks at what happened at the hearing before me on February 23, the respondent unsuccessfully contested the legal argument before me as to



whether the petitioner was debarred from applying for maintenance; she is entitled therefore in my view to costs of that argument and appearance before me from the respondent and I so order. As to other costs including those of the last hearing before me, the petitioner has due to her own lack of responsibility deprived herself largely of what should have been a “stand by”. I think it would be unfair to make the respondent pay the balance of these costs but would also work hardship on the petitioner if she was ordered to pay the respondent’s costs. I therefore order that as to the balance of costs each side do bear his or her own costs.

Leave to appeal is granted.

*Application dismissed.*

For the applicant-petitioner:

*RDC Wilcock*

*Archer & Wilcock, Nairobi*

For the respondent:

*WL Harragin*

*Hamilton Harrison and Mathews, Nairobi*

## **Marie Ayoub and others v Standard Bank of South Africa Ltd and another** [1963] 1 EA 619 (PC)

|                          |  |
|--------------------------|--|
| <b>Division:</b>         | Privy Council  |
| <b>Date of judgment:</b> | 9 December 1963  |
| <b>Case Number:</b>      | 14/1962  |
| <b>Before:</b>           | Viscount Radcliffe, Lord Morris of Borth-y-Gest and Lord Guest               |
| <b>Sourced by:</b>       | LawAfrica  |
| <b>Appeal from:</b>      | E.A.C.A. Civil Appeal No. 33 of 1960; H.M. Supreme Court of Kenya – Miles, J |

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*[1] Trust and trustee – Implied trust – Property owned beneficially by members of family – Legal estate vested in trustee – Property sold to connection of family – Purchaser aware of interest of members of family – Purchaser not required to pay price – Collateral agreement between purchaser and members of family to pay price less sum due to him – Whether trust implied.*

*[2] Executor and administrator – Property owned beneficially by members of family – Legal estate vested in trustee – Property sold to connection of family – Purchase subject to interest of members of family – Claim by sub-lessee against purchaser – Claim compromised by purchaser’s executors – Whether executors entitled to deduct sum paid to sub-lessee from price due to members of family.*

**Editor's Summary**

The Cranhurst Estate, held on a Crown lease for 999 years, was purchased with money provided by the appellants and H., the husband of the third appellant, was registered as proprietor. H. held the estate as trustee for the appellants who were beneficially entitled to it in equal shares. The appellants were all members of the Ayoub family and the second appellant was the widow of G. On May 11, 1964, H. leased the estate to one Z., for five years at a rent of Shs. 60,000/- per annum and on November 11, 1955 H. transferred the estate to G. in purported consideration of Shs. 300,000/-. Next day G. made an agreement with the appellants which recited that the estate had been purchased by the appellants and registered in the name of H., that since the Land Control Board had refused to register the appellants as owners, G. had agreed to take it over and have it registered in his name; that on November 12, 1955, approximately £11,000 was due to G. and that although a transfer of the estate from H. to G. was to

be registered, the total purchase price was not being paid, as G. thereby admitted, notwithstanding that the formal transfer to G. recorded a full receipt, and that the four appellants were entitled to one quarter of the benefit of any sums which might become payable under the agreement. Article 3 of the agreement provided that if G. died before a sale of the estate, his executors should not sell the estate unless the price was agreed by the Ayoub family and each of them. In January 1956, G., as owner re-entered the estate without due process of law and evicted Z. claiming that Z. had defaulted in payment of rent and had failed to maintain the estate. Thereafter Z. sued G. for damages for wrongful re-entry. In March, 1957, G. sold the estate and he died in June, 1957. The respondents as his executors were made parties to the action by Z. and subsequently the respondents compromised the action by a settlement providing for payment by them to Z. of Shs. 133,000/- and costs. The respondents claimed to be entitled to recoup themselves the amounts paid under the settlement by deducting these from the sums payable to the appellants in respect of the proceeds of the estate. The appellants denied the respondents' right to such recoupment and took proceedings claiming a declaration that the respondents were not entitled to make the deduction claimed. The trial judge refused to make the declaration sought which the Court of Appeal confirmed. On further appeal,

**Held –**

- (i) in article 3 of the agreement, G. as owner of the property was giving directions to his executors for the realisation of the property after his death and such a direction was quite inconsistent with G.'s position as trustee;
- (ii) the terms of the agreement were entirely consistent with G.'s position as beneficial owner with contractual obligation to the Ayoub family;
- (iii) G. was beneficial owner and the trial judge and the Court of Appeal were wrong in holding that a trust was to be implied.

Appeal allowed.

**Cases referred to in judgment:**

- (1) *Cook v. Fountain* (1676), 36 E.R. 984.
- (2) *Smith v. Cooke*, [1891] A.C. 297.

**Judgment**

**Lord Guest:** This appeal raises a short point concerning the financial relations between members of the family of Ayoub whose home was Nairobi.

A property, known as the Cranhurst Estate, held on a Crown lease for 999 years was purchased with money provided by the appellants. On November 24, 1944, Leslie Hurley, the husband of the third appellant, was registered as the proprietor. Hurley held the estate as trustee for the appellants who were beneficially entitled to it in equal shares. The appellants are all members of the Ayoub family and the second appellant is the widow of Christos Galanos. On May 11, 1954, Hurley leased the estate to one, Zagoritis, for five years at a rent of £3,000 per annum. On November 11, 1955 Hurley transferred the estate in purported consideration of Shs. 300,000/- to Christos Galanos. On the following day, November 12, 1955, an agreement was entered into between Galanos and the four appellants. On November 29,

1955 the Commissioners of Land gave consent to the registration of Galanos as proprietor of the estate. On January 18, 1956 Galanos re-entered the estate without due process of law and evicted Zagoritis on the claim that Zagoritis had defaulted in payment of rent and failed to maintain the estate. Thereafter Zagoritis instituted proceedings against

Galanos for wrongful re-entry claiming damages of about Shs. 800,000/-. On March 5, 1957 Galanos sold the estate for Shs. 700,000/- payable by instalments. Galanos died on June 29, 1957 and the respondents as his executors were made parties to the action by Zagoritis. They subsequently compromised the action by a settlement providing for payment by them to Zagoritis of Shs. 133,000/- and costs.

The respondents claimed to be entitled to recoup themselves the amounts paid under the settlement by deducting these from the sums payable to the appellants in respect of the proceeds of the estate. The appellants denied the respondents' right to such recoupment and, on August 11, 1959, instituted the present proceedings claiming a declaration that the respondents were not entitled to make the deduction claimed. The action came on for hearing before Miles, J. in the Supreme Court of Kenya on November 25, 1959 and on January 28, 1960, after hearing evidence and arguments, he gave judgment for the respondents. An appeal by the appellants to the Court of Appeal for Eastern Africa was dismissed (O'Connor, P. and Gould, Ag. V.P., Newbold, J.A., dissenting).

Before the trial judge the following issues were framed for the decision of the court:

- “(1) Whether the defendants as trustees are entitled in that capacity to deduct the sums involved in the settlement of Court Case No. 99 of 1956.
- (2) If not, whether they are entitled to deduct the said sums under the agreement of November 12, 1955.”

It was a matter of agreement that if the respondents were trustees, they were entitled to deduct the sums involved in the settlement, as a trustee in the circumstances has a right to reimburse himself. On the other hand, if the respondents were beneficial owners, they were not entitled to make the deduction. In the events which have happened and in the light of the appellants' arguments the decision of the courts below would not appear to lead to an inequitable result. But having regard to the issues framed by the trial judge the sole question which the Board have to consider is whether at the date of his death Galanos was a trustee or whether he was the beneficial owner of the estate. Depending upon the answers to these questions the results follow automatically.

It is first of all necessary to set out in detail the terms of the agreement of November 12, 1955. It is in the following terms:

“An Agreement made the Twelfth day of November One thousand nine hundred and fifty-five Between Christos Galanos of Nairobi in the Colony of Kenya Company Director (hereinafter called Mr. Galanos which expression shall where the context so admits include his personal representatives and assigns) of the first part Marie Ayoub of Nairobi aforesaid Widow of the second part Henry Ayoub of Nairobi aforesaid of the third part Angela Mary Hurley of Nairobi aforesaid of the fourth part and Cecile Galanos of Nairobi aforesaid of the fifth part (hereinafter the parties of the second, third, fourth and fifth parts are collectively referred to as ‘the Ayoub Family’) Whereas

- (1) An Estate known as Cranhurst Estate (hereinafter referred to as ‘the Estate’) and being Land Reference Number 7532 S.W. of Thika Township in the said Colony of Kenya was purchased by the Ayoub Family and registered in the name of the Husband of the party of the fourth part namely Leslie Norman Hurley.
- (2) The Land Control Board has refused to allow the Ayoub Family to have the farm registered in their names and Mr. Galanos has agreed to take over the farm and have the same registered in his name.

- (3) At the date of this Agreement there is due to Mr. Galanos or Tongoni Plantations Limited a sum of approximately Eleven thousand pounds. Although the transfer of the estate from the said Leslie Norman Hurley to Mr. Galanos is being registered the total purchase money is not being paid as Mr. Galanos hereby admits notwithstanding a full receipt having been given in the formal transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos.
- (4) The Ayoub Family and each of them hereby declare that they are entitled to one quarter each of the benefit of any sums which may become payable under this agreement.

Now it is Hereby Agreed and Declared as follows: –

1. Mr. Galanos shall pay to the Ayoub Family a sum which shall represent the difference between the sale price of the Estate and any sums which shall be due either to Mr. Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale.
2. Pending a sale the Ayoub Family and each of them hereby agree that they will not take any action whatsoever to recover the sum due under this Agreement.
3. In the event of the death of Mr. Galanos before sale of the Estate Mr. Galanos hereby directs that his Executors shall not sell the farm unless the price is agreed by the Ayoub Family and each of them and thereafter account to the Ayoub Family in accordance with the terms hereinbefore stated.”

The agreement is signed and witnessed by the parties and is backed up an “Acknowledgment of Debt”.

Before referring to the terms of the agreement it will be convenient to dispose of the principal argument for the respondents which is reflected to some extent in the grounds of judgment of the courts below. It was contended that as Hurley was admittedly a trustee, a transfer by him for no consideration to Galanos who had notice of the outstanding equities constituted Galanos a trustee in the absence of the consent of the beneficiaries. It was therefore necessary, it was argued, for the appellants to show from the terms of the subsequent agreement and any other extrinsic circumstances that the trust was extinguished and that the beneficial interest passed to Galanos. In other words to show that an already existing trust was terminated by the agreement of November 12, 1955. Their Lordships consider that the fallacy underlying this argument is that if the two documents, the transfer and the agreement, are to be considered separately as the respondents suggest, then the transfer must be considered on its merits. Ex facie of the document it was a sale for Shs. 300,000/- (receipt of which Hurley acknowledge in the document) and Galanos was upon this basis a purchaser for value and was not a trustee. It is only when the subsequent agreement of November 12, 1955 is taken into account that it becomes apparent that the consideration was illusory. From these considerations it is clear that both documents must be read together and the question which arises is what from the terms of the instruments they executed were the parties’ intentions.

The law on the matter is accurately stated by Newbold, J.A., in his dissenting judgment. In *Cook v. Fountain* (1) (36 E.R., at p. 987) it was stated

“so the trust, if there be any, must either be implied by the law, or presumed by the court. There is one good, general, and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the court never presumes a trust, but in case of absolute necessity.”

The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied. Their Lordships adopt the observations of Lord Halsbury, L.C. in *Smith v. Cooke* (2) ([1891] A.C., at p. 299:

“I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument . . . I think I am not entitled to put into the instrument something which I do not find there, in order to satisfy an intention which is only reasonable if I presume what their intentions were. I must find out their intentions by the instrument they have executed; and if I cannot find a suggested intention by the terms of the instrument which they have executed I must assume that their intentions were only such as their deed discloses.”

The question therefore is whether from the terms of the agreement of November 12, 1955 it becomes necessary to imply a trust. The intention of the parties must be gathered from the instrument. Upon the principles above enumerated it would in their Lordships opinion be quite impossible to say that the terms of this document required a trust in order to give effect to the intention of the parties. If their intention was to create a trust the absence of the mention of trust in the document is a significant omission. In Recital 1 of the agreement Hurley is not referred to as being a trustee. The terms of Recital 2 state the reason for the transfer and point clearly to Galanos “taking over” as beneficial owner and having the estate registered in his name. In Recital 3 the reference to “purchase money” indicates that Galanos is to be the registered owner in virtue of the transfer. Moreover, in Recital 4 although the interests of the Ayoub family are apportioned, it is nowhere suggested that they have the beneficial interest which might have been expected, had a trust been intended. Under article 1 of the agreement the family were to get the benefit of the agreement by the discharge of their liability out of the proceeds of sale. Galanos’ interest was also secured. The meaning of article 2 is obscure, but it does not give any assistance to the respondents’ argument. In article 3 Galanos as owner of the property is giving directions to his executors for the realisation of the property after his death. Such a direction is quite inconsistent with Galanos’ position as trustee. It is plain to their Lordships that the terms of the agreement are entirely consistent with Galanos’ position as a beneficial owner with contractual obligations to the Ayoub family. They certainly do not point to a trust.

It is not an unreasonable assumption to be gathered from the terms of the document that the intention of the parties was that as the Ayoub family could not be registered as proprietors, Galanos as the rich and able businessman in the family was to take over the property and sell it as and when he thought fit. This was to the advantage of all parties. The family would obtain discharge of their loan out of the proceeds of sale and Galanos would obtain security for his loan over the property. In order to achieve their joint purpose it was necessary that Galanos should be registered as the absolute owner. Although Galanos was not obliged to sell, it was implicit in the agreement that he would sell at the earliest convenient moment.

For these reasons their Lordships have reached the conclusion that Galanos was a beneficial owner and that the courts below were wrong in holding that a trust was to be implied. They prefer the dissenting judgment of Newbold, J.A., which they find entirely satisfactory.

Their Lordships will humbly advise Her Majesty that the appeal be allowed, the order of the Court of Appeal for Eastern Africa dated October 2, 1961

and the decree of the Supreme Court of Kenya dated January 28, 1960 set aside with costs and the appellants granted the declaration claimed in their plaint dated August 11, 1959. The respondents must pay the appellants' costs of this appeal.

*Appeal allowed.*

For the appellants:

*CA Settle, QC and Michael Fox* (both of the English Bar)

*Merriman, White & Co*, London

For the respondents:

*HE Francis, QC and BG Burnett-Hall* (both of the English Bar)

*Lowe & Co*, London

**Mwangi Njoroge v R**  
**[1963] 1 EA 624 (SCK)**

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 30 September 1963                    |
| <b>Case Number:</b>      | 830/1963                             |
| <b>Before:</b>           | Rudd and Wicks JJ                    |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Criminal law – Receiving or retaining stolen property – No evidence that goods stolen – No evidence that accused knew goods stolen – Circumstantial evidence – Concealment of goods – Whether circumstances of possession sufficient proof that goods stolen or received with that knowledge.*

**Editor's Summary**

The appellant was convicted of receiving or retaining stolen property contrary to s. 322 (1) of the Penal Code. The evidence showed that when the appellant's house was searched a large number of M. & B. tablets were found in tins placed under the legs of his bed. When charged the appellant made a cautioned statement to the effect that the tablets were not stolen but that they had belonged to someone else and that he had bought them. In convicting the appellant the magistrate relied on *Idi s/o Waziri v. R.*, [1961] E.A. 146 (T) and held that having regard to the circumstances of the appellant's purchase and possession of the tablets, they had been stolen and that the appellant knew that they had been stolen. On appeal,

**Held** – where there is no direct proof of theft or of receiving goods knowing them to have been stolen, the ordinary rule of circumstantial evidence must be applied, namely, that the circumstances must be such as to convince any reasonable person that no other conclusion was reasonably possible; since it was



possible that the tablets had been concealed because the appellant had committed the minor offence of contravening s. 26 of the Pharmacy and Poisons Ordinance, the magistrate was wrong in convicting the appellant of receiving stolen property.

Appeal allowed. Conviction quashed and sentence set aside.

**Case referred to:**

(1) *Idi s/o Waziri v. R.*, [1961] E.A. 146(T).

**Judgment**

**Rudd J:** read the following judgment of the court: The appellant, Mwangi Njoroge, was convicted by the Resident Magistrate, Thika, on June 15, 1963, of receiving or retaining stolen property contrary to s. 322 (1) of the Penal Code and was sentenced to one year's imprisonment. The appellant appeals against conviction and sentence.

It is not disputed that on the appellant's house being searched a large number of M. & B. tablets were found in tins placed under the legs of his bed. In his judgment the magistrate said:

"Having regard to the circumstances under which the accused bought the tablets and the circumstances of possession by the accused – the way they were hidden in his room – I am satisfied that they were stolen and the accused knew that they were stolen. It is not necessary for the prosecution to prove that the tablets had in fact been stolen. See *Idi s/o Waziri v. R.* (1)."

The relevant ground of appeal is that "the trial magistrate misdirected himself in law in applying the principles enunciated in *Idi s/o Waziri v. R.* (1)." The principles enunciated in *Idi s/o Waziri's* case (1) are first that whether the charge is one of theft or of receiving there need not be direct evidence that the goods were stolen goods, secondly that, an accused having been found to have been in possession of the goods the circumstances of that possession must be examined for the purpose of ascertaining if it can be inferred, on the basis of the normal burden of proof, that the accused received the goods knowing them to have been stolen. This necessarily involves proof of circumstances showing that the accused received the goods knowing that they were in fact stolen and the case decided that the circumstances of the possession may be sufficient to prove that the property was stolen and that the possessor knew that the property was stolen and knew it when he received it. Where there is no direct proof of that the ordinary rule of circumstantial evidence must be applied, that is to say the circumstances must be such as to convince any reasonable person that no other conclusion was reasonably possible in the circumstances. In *Idi s/o Waziri's* case (1) the appellant was convicted on a charge of receiving four bags of coffee. Having ruled that the magistrate's finding that the appellant was in possession of the coffee was correct, Mosdell, J. ([1961] E.A., at p. 148) proceeded to examine the circumstances of that possession, that is, applied the second principle set out above:

"The coffee was hidden in a maize field. It was not in the appellant's shop. One asks why? Because the appellant had committed a minor offence in respect thereof or because he knew that the coffee had been stolen? A cogent and weighty factor which points to the conclusion that the latter was the case is the fact that the appellant attempted to sell the coffee worth Shs. 1,000/- to Sub-Inspector Mir for Shs. 600/-. The presence of the coffee in the maize field rather than in the appellant's shop could, if taken by itself, be explained perhaps by the fact that he was contravening s. 13 of the Coffee Industry Ordinance (Cap. 391) in attempting to sell coffee when he was not licensed to transact business in coffee, or some other law, but the abortive sale at the low price of Shs. 600/- coupled with other factors, namely the clandestine nature of the transaction and the denials of the appellant in the face of the credited prosecution evidence would seem to indicate that the appellant's offence was the more serious one of having received the coffee knowing it to have been stolen."

Applying the second principle in the appeal before us, what were the circumstances of the appellant's possession? The tablets were found concealed in tins under the feet of the appellant's bed. We must ask why? Because the appellant has committed a minor offence in respect thereof or because he knew that the tablets were stolen? As in *Idi s/o Waziri's* case (1) the concealment of the tablets could, if taken by itself, be explained by the fact that the appellant had committed a minor offence in respect thereof, that is, he was contravening s. 26 of the Pharmacy and Poisons Ordinance (Cap. 244). The certificate of the Government Analyst which was admitted into evidence states that certain of the tablets were

sulphonamides and could be classed under Item 11 of the Poisons List Part I (Poisons List Confirmation Order). Section 26 (2) of the Ordinance provides:

“Any person who is in possession of a Part I poison otherwise than in accordance with the provisions of this section shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.”

The appellant made a cautioned statement after being charged, which the magistrate admitted into evidence: “These were not stolen, it belonged to someone else. His name is Joseph. I bought these with money”. Further he made an unsworn statement in his defence which was, “when I bought the stuff I did not know what I was buying. I have never been before a court of law with such stuff. I did not steal these tablets”. Both these statements could equally be explained by the fact that the appellant was contravening s. 26 of the Pharmacy and Poisons Ordinance. These were all the circumstances before the magistrate and there being a possible explanation relating to all these circumstances that the appellant had committed a minor offence it is clear that the magistrate was in error in finding otherwise. This being so the appeal must be allowed.

That the mischief complained of was a breach of an offence other than receiving, that is trafficking in drugs, an offence contrary to s. 26 of the Pharmacy and Poisons Ordinance, appears to have been confirmed by the prosecuting officer, Inspector Hunt, who on informing the magistrate that the accused had no previous convictions, observed that: “Trafficking in drugs in this country is approaching a fantastic number. M. & B. is supposed to be a cure amongst the African for every disease. Consequently an enormous profit is made.”

The conviction is quashed and the sentence set aside.

*Appeal allowed. Conviction quashed and sentence set aside.*

For the appellant:

*Swaraj Singh*

*Swaraj Singh, Nairobi*

For the respondent:

*IR Omolo (Crown Counsel, Kenya)*

*The Attorney General, Kenya*

**Maithaka s/o Gichinga v R**  
**[1963] 1 EA 627 (SCK)**

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 7 October 1963                       |
| <b>Case Number:</b>      | 940/1963                             |
| <b>Before:</b>           | Rudd and Wicks JJ                    |
| <b>Sourced by:</b>       | LawAfrica                            |

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[1] *Criminal law – Charge – Duplicity – Driving motor vehicle in reckless manner and at speed which was dangerous to public – Distinction between conjunctive and disjunctive particulars of offence.*

[2] *Street traffic – Charge – Duplicity – Driving motor vehicle in reckless manner and at speed which was dangerous to public – Distinction between conjunctive and disjunctive particulars of offence.*

### **Editor's Summary**

The appellant was convicted of theft and of unlawfully attempting to strike a person with a dangerous weapon with intent to resist arrest. His appeal against conviction was dismissed, the court being satisfied that there was overwhelming evidence of the appellant's guilt. There was a third count against the appellant of reckless driving and the particulars of the charge stated that the appellant drove a motor vehicle in a reckless manner and at a speed which was dangerous to the public having regard to all the circumstances of the case. The magistrate, relying on *R. v. Wilmot* (1933), 24 Cr. App. Rep. 63, acquitted the appellant of this offence on the ground that the count was bad for duplicity as the commission of two offences was alleged. Although there was no appeal by the Crown against the acquittal, the court considered the question of duplicity.

### **Held –**

- (i) where separate offences are charged in the alternative, that is, disjunctively, using the word “or”, then separate offences are charged in one count which is bad for duplicity, but it is permissible to charge them conjunctively using the word “and” if the matter relates to one single act;
- (ii) since the charge against the appellant had been expressed conjunctively and the particulars referred to one incident or act, namely, the appellant's driving of the motor car at the relevant time, the charge should not have been rejected for duplicity. *R. v. Clow*, [1963] W.L.R. 85 applied.

Appeal dismissed.

### **Cases referred to in judgment:**

- (1) *R. v. Wilmot*, [1933] All E.R. Rep. 628; 24 Cr. App. Rep. 63.
- (2) *R. v. Wells, Ex parte Clifford* (1904), 20 T.L.R. 549
- (3) *R. v. Jones, Ex parte Thomas*, [1921] K.B. 632.
- (4) *R. v. Surrey JJ., Ex parte Witherrick*, [1932] 1 K.B. 450; [1931] All E.R. Rep. 807.
- (5) *R. v. Clow*, [1963] W.L.R. 85; [1963] 2 All E.R. 216.

### **Judgment**

**Rudd J:** read the following judgment of the court: The appellant, Waithaka s/o Gichinga, was convicted by the acting senior resident magistrate, Nairobi, on July 16, 1963, of theft contrary to s. 275 of the Penal Code and unlawfully attempting to strike a person with a dangerous weapon with intent to resist arrest contrary to s. 231 (b) of the Penal Code. The appellant was sentenced to a term of three year's imprisonment on the first charge and seven

years' imprisonment on the second charge, the sentences to be served concurrently. The appellant appealed against conviction and sentence. We dismissed the appeal and reserved our reasons for so doing to be given at a later date, which we now do.

During the late afternoon of June 5, 1963 one Amritlal Sanghani saw his Ford Anglia saloon car, registration no. KFD 267 being driven away from near his shop in Racecourse Road, Nairobi, only the driver being in the car. A call was put through to the police and Amritlal gave chase in another car but without success. Shortly afterwards Inspector Peter Ombai Muga who was on patrol in a police Land Rover received a radio call concerning a stolen motor vehicle, registration no. KFD 267. Inspector Muga started to search for the car and soon afterwards saw it at the junction of Doonholm Road and Heshima Avenue. It was moving and the appellant, who was the only one in the car, was driving it. The appellant was signalled to stop, failed to do so and drove off at fast speed. The chase extended over a distance of about four miles and the Land Rover, whose siren was being sounded most of the time, was unable to overtake it. Eventually a police Ford Consul car, in which was Inspector Meshak, joined in the chase, overtook the Land Rover and drew level with the appellant in the Ford Anglia. The appellant pulled to the right driving into the police Ford Consul, damaging both cars. Both cars pulled up and the appellant got out of the Ford Anglia on the passenger's side and ran. The Land Rover stopped and Inspector Muga gave chase as did Inspector Meshak and the two police constables in his car. Inspector Meshak shouted to the appellant to stop; he did not do so. Later the appellant stopped and threatened Inspector Meshak with a simi. Inspector Meshak fired one round from his revolver over the head of the appellant and continued running, whereupon the appellant ran two or three yards, stopped and threw his simi at Inspector Meshak missing his head by two or three inches. Inspector Meshak then fired two more shots in the air over the appellant's head. The appellant ran on and drew a sheath knife, whereupon Inspector Meshak fired another shot at his legs. The appellant then transferred his knife from his left hand to his right and Inspector Meshak fired another shot at the appellant who ran on about four yards and then fell down. The appellant was arrested and found to be injured in the shoulder. The evidence of Inspectors Muga and Meshak regarding the appellant's escape from the Ford Anglia car, the chase and his apprehension was corroborated by that of the two constables, P. C. Kiplangat and P. C. Wambaa. Their evidence was accepted by the magistrate and there being overwhelming evidence of the appellant's guilt on the two charges we dismissed the appeal. The appellant has a bad record including one previous conviction for assault which he admitted. In the circumstances of the attempt to strike Inspector Meshak with a simi a total sentence of seven years' imprisonment cannot be said to be manifestly excessive. For these reasons we dismissed the appeal against sentence.

The evidence was that the appellant drove at a fast speed, the Land Rover was unable to overtake him and the police Ford Consul had to be driven at between 60 and 70 m.p.h. to overtake the appellant whose speed was estimated to be 60 m.p.h. The chase was within the 30 m.p.h. limit and the appellant drove in a zig-zag manner to avoid pedestrians who scattered in his path. There was a third charge against the appellant of reckless driving contrary to s. 47 (1) of the Traffic Ordinance, Cap. 403, Laws of Kenya, the particulars being that the appellant –

“at about 6.55 p.m. on June 5, 1963, drove a motor vehicle registration no. KFD 267 in Doonholm Road, Nairobi, in the Nairobi Extra Provincial District, in a reckless manner and at a speed which was dangerous to the public having regard to all the circumstances of the case.”

In his judgment the magistrate is recorded as saying:

“A further examination of count 3 reveals, however, that the particulars state that the accused ‘drove . . . in a reckless manner and at a speed which was dangerous . . .’ I observe that the words do not read ‘recklessly or at a speed . . .’ as in *R. v. Wilmot* (1) but I am of the opinion that this count is bad for duplicity as the commission of two offences is alleged. I accordingly acquit the accused of the offence charged under count 3.”

This is not a correct statement of the law. The case of *R. v. Wilmot* (1) referred to by the magistrate follows *R. v. Wells, Ex parte Clifford* (2), which was approved but distinguished in *R. v. Jones, Ex parte Thomas* (3), and in *R. v. Surrey JJ., Ex parte Witherick* (4). The basis of the distinction was that in the case of *Wells, Ex parte Clifford* (2), the single count charged separate offences in the alternative and this is not permissible, whereas in *R. v. Jones, Ex parte Thomas* (3), and *R. v. Surrey JJ., Ex parte Witherick* (4), the offences consisted of one single act and could, therefore, be made the subject of a single count, the defendant’s act being one and indivisible – the act of driving which might be both reckless and at a speed dangerous to the public.

There is really very little in the judgment in *Wilmot’s* case (1), to cast doubt on the correctness of this distinction, but nevertheless some doubts appear to have been entertained as to that in certain quarters, as a result of the decision in *Wilmot’s* case (1). Indeed, the learned editors of the 34th Edn. of Archbold expressed themselves in terms which lend some support to the decision of the learned magistrate in this case. However, the matter has now been settled beyond doubt by the court of Appeal in England in the recent case of *R. v. Clow* (5), where the distinction drawn in *R. v. Jones, Ex parte Thomas* (3), and *R. v. Surrey JJ., Ex parte Witherick* (4) was firmly re-established. In *R. v. Wilmot* (1) the particulars of the offence were that the appellant drove a motor car recklessly *or* at a speed *or* in a manner which was dangerous. This was held to be bad for duplicity, three separate offences having been charged in the alternative. In *R. v. Clow* (5), the appellant was charged with causing death by dangerous driving, the particulars being that he drove a motor car at a speed *and* in a manner dangerous to the public having regard to all the circumstances. Lord Parker, C.J., delivering the judgment of the court referred to and approved *R. v. Wilmot* (1), but affirmed the distinction between charging offences in the alternative, and charging that a man by one act has committed two offences. The result is that where separate offences are charged in the alternative, that is, disjunctively, using the word, “or”, then separate offences are charged in one count and that is bad for duplicity, but, however illogical it may seem, even if these are separate offences, it is permissible to charge them conjunctively using the word “and” if the matter relates to one single act. Applying these principles to the case, the appellant having been charged conjunctively and the matter relating to one incident or act, namely, the appellant’s driving of the motor car at the time in question, it is clear that the charge was a good charge and it should not have been dismissed for duplicity. We draw attention to this matter for the future guidance of magistrates and others concerned in the prosecution of these traffic offences, who may not be aware of the decision in *R. v. Clow* (5). The appellant was acquitted on this count on a ground which was not good in law, but there has been no appeal by way of case stated from the acquittal and there can be no question in this appeal of disturbing the acquittal on the traffic count.

*Appeal dismissed.*

The appellant did not appear and was not represented.

For the respondent:

VS Dhir (Crown Counsel, Kenya)  
The Attorney General, Kenya

**Kimbo Munyoki v R**  
**[1963] 1 EA 630 (SCK)**

**Division:** HM Supreme Court of Kenya at Nairobi  
**Date of judgment:** 26 July 1963  
**Case Number:** 47/1963 (Mombasa)  
**Before:** Sir John Ainley CJ and Dalton J  
**Sourced by:** LawAfrica

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*[1] Criminal law – Possessing instrument of housebreaking – “pencil” torch an instrument of housebreaking.*

### Editor’s Summary

The appellant was convicted of possessing an instrument of housebreaking, namely, a “pencil” torch, contrary to s. 308 (1) (c) of the Penal Code. On appeal,

**Held** – an instrument of housebreaking should be capable of being used for the actual physical breaking of a house and as a “pencil” torch cannot break a house, pick a lock, force a window or open a door it is not an instrument of housebreaking.

Appeal allowed.

### No cases referred to in judgment

### Judgment

**Sir John Ainley CJ:** read the following judgment of the court: In this case we dismissed the appeal of the appellant against his conviction for theft. We allowed his appeal against a conviction for possessing an instrument of housebreaking contrary to s. 308(1) (c) of the Penal Code, and now give our reasons for so doing. The instrument in question was a “pencil” torch, an instrument which would doubtless be very useful to a burglar, but which was not, we considered, “an instrument of housebreaking”.

There is very little authority on the question what is an instrument of housebreaking, but such authority as there is indicates that the instrument must be capable of being used for the actual physical breaking of a house. For example, a jemmy, a pick-lock, or a skeleton key can be used to force a door or window or to turn a lock, and are clearly instruments of housebreaking. Other instruments whose normal uses are innocent, such as screw drivers, drills and the like can in proper cases be held to be instruments of housebreaking, because they are capable in the hands of a burglar of the physical breaking of a house. But we are unaware of any authority for saying that what may be called mere adjuncts to burglary can be

regarded as housebreaking instruments. A light of some kind is no doubt useful to a burglar. A “pencil” torch is probably of more use to him for certain kinds of work than a wide beamed torch or a box of matches, but he cannot break a house, pick a lock, force a window or open a door with a pencil torch, and for that reason we think that a pencil torch is not an instrument of housebreaking. It was for this reason that we allowed the appeal.

*Appeal allowed.*

The appellant did not appear and was not represented.

For the respondent:

*VS Dhir* (Crown Counsel, Kenya)

*The Attorney General*, Kenya

## **Matiya K Wamala v Samusoni Sebutemba and others** [1963] 1 EA 631 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 29 November 1963                |
| <b>Case Number:</b>      | 355/1963                        |
| <b>Before:</b>           | Slade J                         |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Jurisdiction – Buganda courts – Suit filed in High Court – Application for transfer of suit – Suit for damages – Collision – Allegations of negligence and nuisance – Issues of partnership and vicarious liability involved – Principles on which case transferable to Buganda Courts – Buganda Courts Ordinance (Cap. 77), s. 2, s. 7, s. 9, s. 10 (U.) – Uganda Order in Council, 1902 s. 20 (U.) – Constitution of Uganda, s. 74 (U.).*

### **Editor’s Summary**

The plaintiff filed an action in the High Court for damages arising from a collision between his motor car and an omnibus owned by the defendants. One of the defendants applied for the transfer of the suit to the Principal Court under the provisions of s. 7 of the Buganda Courts Ordinance, which provides that where any proceedings of a civil or criminal nature, which a court (i.e. a court to which the Ordinance applies) has jurisdiction to try, are commenced in a subordinate court or in the High Court, they shall be transferred to a court having jurisdiction. By s. 6 a court to which the Ordinance applies may, subject to any limitation contained in its warrant or expressed in the Ordinance or in any other law, exercise jurisdiction over all causes and matters where, in proceedings of a civil nature, all the parties are Africans and by s. 9 no court to which the Ordinance applies has jurisdiction, by virtue of para. (c) of the section, in any proceedings “. . . taken under any Ordinance or any English or Indian law in force in Uganda unless such court has been authorized to administer or enforce such Ordinance or law by the terms of an Ordinance or under section 12 of this Ordinance”. Section 10 declares that such a court shall administer



and enforce certain laws only, namely, laws enacted by the Lukiiko, customary law prevailing in Buganda, and other laws authorized to be administered and enforced by statutory authority or under s. 12 of the Ordinance. The plaintiff's claim was founded on negligence or alternatively, on nuisance and raised, *inter alia*, issues of partnership and vicarious liability. There was no dispute that all the parties to the suit were Africans within s. 2 of the Ordinance and the question for decision was whether there were limitations upon the exercise of jurisdiction by the Principal Court.

**Held –**

- (i) by virtue of the revocation of s. 20 of the Uganda Order in Council, 1902, the High Court is no longer required to be guided by “native law” in every case in which Africans are parties, and the Ordinances in force and the statutes of the Uganda Parliament do not now necessarily prevail over laws enacted by the Buganda Legislature;
- (ii) an African litigant may come to the High Court and seek the redress to which he considers he is entitled under an Ordinance, statute or any English or Indian law (including the common law of England) in force in Uganda against another African on a cause of action arising in Buganda;
- (iii) in considering whether the Principal Court or other court has jurisdiction, the High Court must, in addition to the principles enunciated in the case of *Reuben Musanje v. Tomasi Yamulemye* (1), be satisfied that such a court will not be required to administer and enforce on behalf of either party, in the absence of “written law” such parts of the laws of England, including the common law, as are in force in Uganda at the time of the application for transfer;

- (iv) from the issues of law disclosed by the pleadings, it was clear that even apart from the question of partnership, questions might arise which will require determination in accordance with the substance of the common law, among them being those relating to vicarious liability and nuisance;
- (v) the onus was upon the party seeking the transfer of proceedings to satisfy the court that the court to which the proceedings were sought to be transferred had jurisdiction;
- (vi) the court was not persuaded that the Principal Court had jurisdiction to try the issues between the parties.

Application dismissed.

#### **Cases referred to in judgment:**

- (1) *Reuben Musanje v. Tomasi Yamulemye*, [1961] E. A. 716 (C.A.).
- (2) *Semakula v. Bwanika*, E.A.C.A. Civil Appeal No. 35 of 1963 (unreported).

#### **Judgment**

**Slade J:** This is an application on the part of one defendant for the transfer of a suit, commenced in this court, to the Principal Court under the provisions of s. 7 of the Buganda Courts Ordinance (hereinafter for convenience referred to as “the Ordinance”) the relevant portion of which is in the following terms:

“7. Where any proceedings of a civil or criminal nature which a court [i.e. a court to which the Ordinance applies] has jurisdiction to try are commenced in a subordinate court or the High Court, they shall be transferred to a court having jurisdiction: Provided . . .”

The suit is a claim by the plaintiff for damages arising from a collision between his motor car and an omnibus owned by the four defendants, who are alleged to trade in partnership, as a result of which the motor car was damaged. The claim is founded on negligence or, alternatively, on nuisance.

The first defendant, the present applicant, has entered an appearance and filed a written statement of defence, admitting the description of the parties, and claiming that this court has no jurisdiction to try the suit, and in the alternative, denying negligence on his part, the creation or adoption of a nuisance, and the loss and damage alleged in the plaint.

The third defendant has also entered an appearance and filed a written statement of defence which differs from that filed by the first defendant only in that he denies that a partnership exists between himself and the other named defendants.

An appearance had been entered for the third defendant, but no written statement of defence has been filed, and I am informed that the fourth defendant has not been served with the summons to enter appearance.

It is clear that on the pleadings as they stand at the date of this application the following issues may arise –

- (a) whether a partnership existed between the defendants at all material times;
- (b) whether the persons in charge of the omnibus were the servants or agents of the defendants;
- (c) whether the acts or omissions of those persons were negligent or constituted a nuisance;

- (d) if so, whether the plaintiff suffered loss or damage thereby;
- (e) whether the defendants are vicariously liable for such loss or damage.

It is worthy of note that neither the first nor third defendant has pleaded contributory negligence on the part of the plaintiff, the reason no doubt being that in view of the decision of the East African Court of Appeal in *Musanje's* case (1), such a course would have defeated the present application for transfer.

I now turn to consider whether the Principal Court is “a court having jurisdiction” (see s. 7 of the Ordinance) in this suit.

By s. 6 of the Ordinance a court to which the Ordinance applies (and the Principal Court is such a court) may, subject to any limitation contained in its warrant or expressed in the Ordinance or in any other law, exercise jurisdiction over all causes and matters where, in proceedings of a civil nature, all the parties are Africans. There is, I think, no dispute that all the parties to this suit are Africans within the meaning assigned to that word by s. 2 of the Ordinance, and it is therefore necessary only to ascertain whether there are limitations upon the exercise of the jurisdiction of the Principal Court. By s. 9 of the Ordinance no court to which the Ordinance applies has jurisdiction, by virtue of para. (c) of the section, in any proceedings:

“... taken under any Ordinance or any English or Indian law in force in Uganda unless such court has been authorized to administer or enforce such Ordinance or law by the terms of an Ordinance or under section 12 of this Ordinance,”

and s. 10 of the Ordinance declares that such a court shall administer and enforce certain laws only, these laws being laws enacted by the Lukiiko, customary law prevailing in Buganda, and Ordinances and other laws authorized to be administered and enforced by statutory authority or under s. 12 of the Ordinance.

It is not, I think, in question in the circumstances of the instant case, that any such statutory authority exists or that any authority had been conferred under s. 12 of the Ordinance.

Having disposed of these matters, I am now concerned to decide whether these proceedings are “taken under” – the phrase used in s. 9 (c) of the Ordinance – “any Ordinance or any English law in force in Uganda”. So far as statutory law is concerned, the position was considered by the East African Court of Appeal in the case of *Reuben Musanje v. Tomasi Yamulemye* (1). In that case it was said (letter B at p. 727):

“... Before it can be satisfied that a Buganda Court has jurisdiction, the High Court must be satisfied that the court trying the case will not be required to administer and enforce, on behalf of either party, the provisions of any Ordinance.”

I would, with respect, qualify that statement of the law by adding the phrase “which it is not authorized to administer and enforce” (see s. 10 of the Ordinance).

The question of transfer under s. 7 of the Ordinance where no Uganda Ordinance or Statute is to be administered and enforced on behalf of either party is therefore clear and, subject to a qualification with which I attempt to deal later, can be regarded as settled. It is, however, necessary to consider the position arising if it appears that the court trying the case is required to administer and enforce the common law, since I think there is no doubt that the phrase “any English law in force in Uganda” includes the common law and is not confined to statutory law – see per McKisack, C.J., in *Mutyaba's* case.

At the time *Musanje's* case (1) was decided, the High Court was expressed to have full jurisdiction, civil and criminal, over all persons and all matters in Uganda, such jurisdiction to be exercised in conformity with, *inter alia*, the substance of the common law, the doctrines of equity, and the statutes of general

application in force in England on the 11th day of August, 1902 – see s. 15 of the Uganda Order in Council, 1902. However, s. 20 of the 1902 Order in Council declared that in all cases, civil and criminal, to which natives were parties, the courts were to be guided by native law so far as it was applicable and not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance or any rule or regulation made under an Order in Council or Ordinance. The effect of s. 20 of the 1902 Order in Council was considered by Forbes, V.P., who said in the course of his judgment in *Musanje's* case (1) ([1961] E.A. at p. 724):

“ . . . It is clear from the provisions of s. 20 that the English common law, in its application to Uganda in cases to which natives are parties, is subject to native law (except in so far as such native law may be repugnant to justice or morality) but native law is subject, *inter alia*, to the provisions of any Ordinance. In these circumstances, where a case between Africans in Buganda purports to be “taken under” English common law, if the cause of action is known to native law, it is the native law which is to be applied. Whatever the form, the case in substance is . . . a case under native law. On the other hand, since an Ordinance overrides native law in case of inconsistency, where a case is taken under the provisions of an Ordinance those provisions prevail and must be applied, and there need be no reference to native law on the subject.”

The effect of s. 20 of the 1902 Order in Council therefore appeared to be that where native law provided a remedy in a case in which the parties were Africans, that native law prevailed over the common law (unless the native law was repugnant to justice or morality), but if that native law was inconsistent with statutory enactments then the latter prevailed. It would seem to follow that it was a logical extension of this principle that if in any case between Africans before the High Court, the case for either party depended on consideration of both statutory enactment *and* common law, and it appeared that native law provided a remedy, but that that native law was inconsistent with both the statutory provision and the common law, then the High Court must administer and enforce the statute so far as it affected some of the issues and decide the remainder according to native law.

Be that, however, as it may, I am not persuaded that, on the law as it now stands, the learned Vice-President's dictum in relation to the common law remains applicable, and it would appear to require some modification in relation to written law. In so saying I am, of course, conscious that the East African Court of Appeal has recently approved the statement of the law as laid down in *Musanje's* case (1), in the case of *Semakula v. Bwanika* (2) – but it does not seem to me that their Lordships were apprised of what I regard as fundamental changes in the law which had taken place after the decision in *Musanje's* case (1). Under s. 90 of the Constitution of Uganda, the High Court is established, having such jurisdiction as is conferred upon it by the Constitution itself or by any other law. So far as civil matters are concerned, jurisdiction is conferred, *inter alia*, by the Civil Procedure Ordinance (Cap. 6) by the provisions of which all courts (other than courts established under the African Courts Ordinance or Buganda Courts Ordinance) have jurisdiction to try all suits of a civil nature, excepting suits of which the cognizance of any such court is expressly or impliedly barred. I do not think that the effect of s. 7 of the Buganda Courts Ordinance is either expressly or impliedly to bar the High Court taking cognizance of any proceedings; it merely requires certain proceedings to be transferred in certain circumstances.

By s. 2 of the Judicature Ordinance, 1962, the jurisdiction of the High Court is to be exercised in conformity with the written laws (a term which is defined in

the Interpretation Act, 1963) in force in Uganda and subject to such written laws and, so far as they do not extend or apply, in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 11, 1902.

The provisions of the Judicature Ordinance, 1962, to which I have referred, thus replace the provisions of s. 15 (2) of the 1902 Order in Council which ceased to apply on the coming into effect of the Uganda (Independence) Order in Council, 1962 on October 9, 1962. The provisions of s. 20 of the 1902 Order in Council which were revoked by the Uganda (Constitution) Order in Council 1962 with effect from March 1, 1962, have however not been re-enacted by the Judicature Ordinance, 1962, or so far as I am aware, by any other statutory provision.

Further, by virtue of s. 74 of the Constitution of Uganda the position in relation to legislation has changed since the decision in *Musanje's* case (1). Under s. 74 (1) the Legislature of the Buganda Kingdom is vested with powers, to the exclusion of Parliament, to make laws for the peace, order and good government of Buganda in respect of certain matters particularly set out in Part I of Schedule 7 to the Constitution. At the same time, by virtue of s. 74 (2), Parliament has power, to the exclusion of the Legislature of Buganda, to make laws in relation to Buganda in respect of matters more particularly specified in Part II of Schedule 7 to the Constitution, and by s. 74 (3) both Parliament and the Buganda Legislature are vested with legislative powers in relation to matters not specified in Schedule 7.

By virtue of s. 76 of the Constitution, if a law enacted by the Legislature of a Federal State (and under s. 2 (2) of the Constitution that expression includes Buganda) is inconsistent with a law validly made by Parliament, the latter law prevails and the former is void to the extent of the inconsistency.

The position has, therefore, as I see it, changed materially since the time when *Musanje's* case (1), and those cited in that case were decided. By virtue of the revocation of s. 20 of the 1902 Order in Council the High Court is no longer required to be guided by "native law" in every case in which Africans are parties, and the Ordinances in force and the Statutes of the Uganda Parliament do not now necessarily prevail over laws enacted by the Buganda Legislature.

I am of the opinion that the position in relation to the transfer of cases under s. 7 of the Ordinance is as follows:

A litigant who is an African may come into this court and seek the redress to which he considers he is entitled under an Ordinance, Statute or any English or Indian law (including the common law of England) in force in Uganda against another African on a cause of action arising in Buganda. In any such case a defendant who seeks, under s. 7 of the Ordinance, a transfer of the case to the Principal Court or other court to which the Ordinance applies must show that that court has jurisdiction under s. 10 of the Ordinance.

Applying the principles enunciated in *Musanje's* case (1), before the High Court is satisfied that a court has jurisdiction, it must be satisfied that it will not be required to administer and enforce on behalf of either party, an Ordinance or Statute which deals with a subject on Parliament's "exclusive list" or which, if it deals with a subject on the "concurrent list", prevails over a law of the Buganda Legislature. In addition it must in my view be satisfied that it will not be required to administer and enforce on behalf of either party, in the absence of "written law" such parts of the laws of England, including the common law, as are in force in Uganda at the time of the application for transfer.

I have earlier attempted to set out the issues of law disclosed on the pleadings so far filed. It is clear

that, even apart from the question of partnership, in

connection with which it will probably be necessary to invoke the provisions of the partnership Ordinance, questions may arise which will require determination in accordance with the substance of the common law, among them being those relating to vicarious liability and nuisance.

It is well settled that the onus is upon the party seeking the transfer of proceedings to satisfy this court that the court to which the proceedings are sought to be transferred has jurisdiction. For the reasons I have endeavoured to state, I am not persuaded that the Principal Court has jurisdiction to try the issues between the parties and the application for transfer is therefore dismissed with costs to the plaintiff.

*Application dismissed.*

For the plaintiff:

*OJ Keeble*

*Hunter & Grieg, Kampala*

For the defendants:

*SH Dalal*

*Haque, Dalal & Singh, Kampala*

**Kirima Estates (U) Ltd v K G Korde**  
[1963] 1 EA 636 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 9 December 1963                 |
| <b>Case Number:</b>      | 49/1963                         |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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*[1] Advocate – Negligence – Money lent on mortgage on advice of advocate – Alleged misrepresentation by advocate of value of security – Failure of advocate to obtain valuation – Default by mortgagor – Sale of security at loss to client – Defence that loss due to fall in price of property.*

**Editor's Summary**

The plaintiff company relying entirely on the advice and opinion of the defendant, an advocate, as to the value as security of certain property, lent Shs. 60,000/- upon a mortgage which required the principal sum to be repaid in February, 1959. The mortgagor did not pay the principal sum and in 1961, after an auction had brought no bids at the plaintiff company, on the defendant's advice, took over the property, sold it for Shs. 45,000/- and sued the defendant alleging negligence and claiming from him the loss sustained. The plaintiff company alleged that the property was never adequate security for the sum of Shs. 60,000/-



lent as the property was not worth Shs. 120,000/- as the defendant had represented, that the defendant was negligent in his duty as advocate in advising as to the value of the property, and that he had failed, *inter alia*, to engage a surveyor or estate agent to assess the value of the property as security and to make local enquiries as to the value of the property or as to the value of similar properties in the locality. In his defence the defendant denied liability, maintained that he was not in any way negligent in discharge of his duty and, *inter alia*, that his opinion always was that a loan of Shs. 60,000/- was secure because residential premises were scarce and rents thereof high and that it became impossible to sell the property in 1960 by public auction because of a “slump” in the property market which could not have been foreseen in 1957. The defendant also contended that it was not his duty to engage a surveyor or estate agent to value the property before advising the plaintiff company to lend and that it was for the plaintiff company to arrange for a proper valuation on receiving the particulars from the defendant. The issues before the court were whether it was the duty of the defendant to have had a proper valuation of the property made before advising the plaintiff company as his client to lend, whether the property was adequate in 1957 for the sum advanced and whether the defendant was liable in the circumstances.

**Held –**

- (i) the mere failure to engage a surveyor or estate agent or any other qualified person to value the property before advising the plaintiff company to invest in it, cannot amount to negligence, and for such an act of omission to amount to negligence it must be shown that the property was worth far less than the value assessed by the defendant;
- (ii) the property was not an adequate security for the loan of Shs. 60,000/- in 1957 when the loan was granted, and in assessing the value of the property at Shs. 120,000/- the defendant had failed to exercise that due care, skill and diligence expected of him in the discharge of his duty to the plaintiff company as his client, in that he failed to make adequate enquiries as to the value of the property and also failed to engage the services of a surveyor, estate agent or valuer and thereby failed to have a proper valuation of the property made before advising his client to invest in it;
- (iii) the defendant was perfunctory and reckless in stating the value of the property to be Shs. 120,000/- as he had no reasonable ground upon which to base his valuation;
- (iv) upon the evidence the defendant was not only negligent in the discharge of his duty to his client but had also committed a breach of that duty.

Judgment for the plaintiff company.

**Cases referred to in judgment:**

- (1) *William Abercrombie Shaw v. Frederick Chater Jack* (1932), 14 K.L.R. 1.
- (2) *Hedley Byrne & Co. Ltd. v. Heller Son & Co. Ltd.*, [1963] 2 All E.R. 575.
- (3) *John Hart & W. Hodge v. John Frame, Son & Co.* (1839), 6 Cl. & Fin. 193.
- (4) *Purves v. Landell* (1845), 12 Cl. & Fin. 91.

**Judgment**

**Udo Udoma CJ:** The plaintiff's claim against the defendant in this action is for the sum of Shs. 27,389/55 as damages for negligence. The defendant has denied liability.

In the plaint filed, the plaintiff, which is a private limited liability company, pleaded as set out hereunder:

- "1. The plaintiff is a Private limited liability company duly incorporated in Uganda with Registered Office at Kampala and whose address for the service of this suit is care of Messrs. Jobanputra & Pandya, Advocates, Kampala.
- 2. The defendant is an Indian Advocate practising in Kampala as Korde & Esmail, Advocates, Kampala.
- 3. During 1956, 1957 and 1958 the defendant was engaged by the plaintiff as its advocate.
- 4. On or about 26th January, 1957 the defendant sent a proposal to the plaintiff's directors who were then resident in London United Kingdom advising the company to lend a sum of Shs. 60,000/- (Shillings sixty thousand only) bearing interest at 12 per cent. per annum to one Sadhu Ram Bana Ram on the security of lands comprised in leasehold Register Volume 221 Folio 10 known as Plot No. 18, Kanjokya Street, Kampala and the defendant at the same time advised the plaintiff that the said Sadhu Ram Bana Ram had spent Shs. 120,000/- in the erection of a building on the said lands and that the

said Sadhu Ram Bana Ram had been offered the sum of Shs. 120,000/- to sell the said building and lands and that the said building and lands were sound security for a loan of Shs. 60,000/-. A copy of the said advice is annexed hereto and marked 'A'.

5. Relying on the said advice of the defendant the plaintiff lent to the said Sadhu Ram Bana Ram the sum of Shs. 60,000/- on the security of a mortgage on the said lands. A copy of the mortgage deed is annexed hereto and marked 'B'.
6. The defendant was negligent in his duty as the advocate of plaintiff in advising the plaintiff as to the value of the said lands and the soundness of the said proposal for a loan of Shs. 60,000/-.

*Particulars of Negligence*

- (a) Failing to engage a qualified surveyor or an estate agent to assess the value of the property.
  - (b) Failing to inspect the property.
  - (c) Failing to make local enquiries as to the value of the property.
  - (d) Failing to make local enquiries as to the value of similar properties in that locality.
  - (e) Failing to examine the plan of the property and the statement of account for costs of total materials used and labour engaged.
  - (f) Giving an excessively high valuation of the property.
7. The value of the said lands and buildings in January, 1957, did not in fact exceed Shs. 45,000/-.
  8. As a consequence of the failure by the said Sadhu Ram Bana Ram to comply with covenants under the said mortgage deed plaintiff was entitled to and did realize the security by sale of the mortgaged property on the 2nd day February, 1961, the greatest price which could be so realized was Shs. 45,000/-.
  9. As a consequence of the said negligence of the defendant the plaintiff has suffered loss and damage of Shs. 26,219/90 which loss it now claims from the defendant:

*Particulars*

|   |                                  |
|---|----------------------------------|
| Principal sum lent  | Shs. 60,000.00                   |
| Arrears of interest   | 4,200.00                         |
| Auctioneer's charges  | 700.00                           |
| Advocates' costs  | 2,230.00                         |
|   | <hr/>                            |
| <i>Total</i>  | Shs.<br>67,130.00                |
| Less sum realized on sale   | 45,000.00                        |
|   | <hr/>                            |
|   | <i>Loss</i><br>Shs.<br>22,130.00 |
| Interest on the balance of Shs. 22,130/- at<br>12 per cent. per annum from 2.2.1961 to<br>the date hereof | <br><br><br><br><br><br><hr/>    |
|   | 4,089.90                         |
|   | <hr/>                            |
|   | Shs.<br>26,219.90                |
|   | <hr/>                            |

10. The defendant resides at Kampala District Mengo within the jurisdiction of this Honourable Court.

WHEREFORE the plaintiff prays for judgment and decree against the defendant for:

- (a) Shs. 26,219.90 as per paragraph No. 9 hereof,
- (b) costs,

(c) interest thereon at 6 per cent. per annum from the date hereof till payment in full.”

In answer to the averments contained in the plaintiff’s plaint the defendant, an advocate practising in Kampala, has pleaded in his written statement of defence as follows:

“The defendant above-named states as follows:

1. Save and except as hereinafter expressly admitted the defendant denies each and every allegation contained in the plaint.
2. The defendant admits paras. 1, 2 and 3 of the plaint.
3. The plaintiffs’ claim is time barred and/or the plaintiffs are guilty of laches.
4. With regard to para. 4 of the plaint the defendant states that he sent two proposals to the plaintiffs and gave his opinion as stated in the annexure marked ‘A’ and annexed to the plaint. The defendant craves leave to refer to the said annexure. The plaintiffs chose to lend money to Sadhu Ram Bana Ram referred to in para. 4 of the plaint.
5. With regard to para. 5 of the plaint the defendant states that apart from the opinion expressed by the defendant the plaintiffs were aware of the prices of the properties then prevailing in Kampala and lent the money accordingly.
6. The defendant denies that he was negligent as alleged in para. 6 of the plaint or at all.
7. With regard to para. 7 of the plaint the defendant denies that the value of the said lands and the buildings in January, 1957 did not exceed Shs. 45,000/-.
8. With regard to para. 8 of the plaint the defendant states that the value of the said buildings and the land was much more than Shs. 45,000/- but the said land together with the buildings was purchased for Shs. 45,000/- by one of the Directors of the plaintiff Company by private arrangements between the said Purchasing Director and the plaintiff Company and was not purchased in the Public Auction.
9. With regard to para. 9 of the plaint the defendant denies the plaintiffs’ claim for damages as alleged or at all. Alternatively and without prejudice to the foregoing the defendant states that the plaintiffs have waived their claim for damages.

WHEREFORE the defendant prays that this Honourable Court may be pleased to dismiss the plaintiffs’ suit, with costs.”

The case of the plaintiff in support of its claim is that from 1956 to 1958 the defendant was engaged and acted as its advocate and solicitor. In 1957 while in London, where two of its three directors were then resident, Abdul Gulam Hussein Pirbhai (P.W. 1), one of the directors of the plaintiff company, acting on behalf of the said company, wrote to the defendant as an advocate and solicitor of the said company intimating that the plaintiff company was interested and desirous of investing in mortgages in Kampala. In reply he received a letter dated January 26, 1957, exhibited in these proceedings and marked Ex. A.2. Attached to that letter there were particulars of certain property – the attachment is in these proceedings marked Ex. A. 3.

It is the plaintiff’s case that acting on the advice and relying entirely on the opinion of the defendant expressed in his letter Ex. A. 2 and A. 3 as to the value and soundness of the property as security the plaintiff company agreed to and did lend the sum of Shs. 60,000/- to one Sadhu Ram Bana Ram through the defendant on the security of the said Sadhu Ram Bana Ram’s through the defendant on the security of the said Sadhu Ram Bana Ram’s lands comprised

in the leasehold register Volume 221, Folio 10 and known as Plot No. 18 Kanjokya Street, Kampala, Uganda.

In February, 1957, in consideration of the said sum of Shs. 60,000/- thus lent, a mortgage was executed in favour of the plaintiff company over the property aforesaid. The mortgage was registered on March 4, 1957, and, according to its terms, it was redeemable on the repayment of the principal sum and interest thereon at twelve per cent. per annum in February, 1959. After execution, the mortgage deed was forwarded by the defendant to and received by the plaintiff company in London.

On receiving the mortgage deed duly registered, Abdul Gulam Hussein Pirbhai (P.W. 1) decided to check on the advice of the defendant as to the value of the security and the soundness of the investment. He communicated with a broker in Kampala by the name of Tulsidas, and, from information which he received, by his letter, Ex. A.7, informed the defendant that the property Plot No. 18 Kanjokya Street had been valued by a broker as worth only Shs. 60,000/-. In reply the defendant by his letter, Ex. A.9 wrote:

“About Sadhu Ram’s property, please do not worry. The plot is today offered Shs. 100,000/-. Value of residential houses at Kololo has not very much gone down. I do not think the value of Kampala properties will go down to a considerable extent. The other day there was a plot at Wandegeya on which there was Haveli Ram’s mortgage for Shs. 40,000/-. Nobody expected that it would realize more than Shs. 60,000/- in the auction. But actually it was sold for Shs. 85,000/-.”

The plaintiff company says that on receiving that letter, it was satisfied with the assurance thus given as to the soundness of the security.

Then in October, 1958, Abdul Gulam Hussein Pirbhai (P.W. 1) visited Kampala from London. He inspected the property, Plot No. 18 Kanjokya Street, and thereafter formed the impression that as security it was not worth much as it could not fetch Shs. 60,000/- at a public auction. He, however, did not mention that fact to the defendant because the defendant had previously assured the plaintiff company that in any event the mortgagor would be in a position to pay off the mortgage debt and redeem the mortgage when the time came as he was doing well in business.

But in February, 1959, when the mortgage was due to be redeemed, the plaintiff company says that it received a letter, Ex. A.18 from the defendant to the effect that the mortgagor would pay off the debt in June, 1959. There was however no payment forthcoming in June, 1959. Then there followed a series of correspondence between the plaintiff company and the defendant as to the payment of the mortgage debt and interest thereon. Finally, when neither the principal sum nor the interest due thereon was paid, on the instructions of the plaintiff company, the defendant served the mortgagor with the usual notices and thereafter put up the mortgaged property, Plot No. 18 Kanjokya Street, Kampala, for sale by public auction. It attracted no bid at all.

Thereupon the defendant by his letter, Ex. A. 46, duly informed the plaintiff company of the position at the same time advising the plaintiff company to consider buying the property for Shs. 50,000/- as there was considerable difficulty in selling it, and thereafter to sue the mortgagor for the balance of the debt. Acting on that advice, the plaintiff company says that it sold the property for Shs. 45,000/- to one of the directors of the plaintiff company, namely, the mother of Abdul Gulam Hussein Pirbhai (P.W. 1); and that it was the defendant who effected the legal transfer of the property after the sale and that he was paid the sum of Shs. 2,230/- for his professional services. In the meantime interest on the principal debt had reached the sum of Shs. 4,200/-.

The plaintiff company now complains:

- (1) That the property known as Plot No. 18 Kanjokya Street, Kampala was not an adequate security for the sum of Shs. 60,000/- which it had advanced on it on the advice of the defendant, as the property was not worth Shs. 120,000/- as was represented to it by the defendant;
  - (2) that the defendant was negligent in his duty as its Advocate and Solicitor in advising it as to the value of the said property and as to the soundness of the proposal to lend Shs. 60,000/- upon the security in that before advising it the defendant failed:
    - (a) to engage a qualified surveyor or an estate agent to assess the value of the property as security;
    - (b) to inspect the property;
    - (c) to make local enquiries as to the value of the property;
    - (d) to make local enquiries as to the value of similar properties in the locality;
    - (e) to examine the plan of the property and the statement of account for costs of total materials used and labour engaged;
- and
- (3) that the defendant gave an excessively high valuation of the property.

The plaintiff company says further that by selling the property at Shs. 45,000/- it has sustained the total loss of Shs. 27,389/55, which it now claims from the defendant.

In his defence the defendant has denied liability. He has maintained that he was not in any way negligent in the discharge of his duty to the plaintiff company. He has admitted that he was from 1956 to 1958 engaged and acted as advocate of the plaintiff company and that he gave the opinion expressed in his letter and the attachments thereto, Exs. A.2 and A.3, as he was then satisfied that the Plot No. 18 Kanjokya Street, Kampala was worth then the sum of Shs. 120,000/-.

It is the defendant's case that before he recommended the property to the plaintiff company he had inspected the same in the company of an estate agent in Kampala. It was his opinion then as now that the sum of Shs. 60,000/- was quite safe on the property because at that time residential premises were scarce and rents thereof high. He had to examine the books of account of Sadhu Ram Bana Ram before arriving at the value of the property.

The case of the defendant is that if in 1958 or 1959 the plaintiff company had instructed him to do so he would have successfully sold the property for much more than the sum of Shs. 60,000/- which was invested in it. It was his opinion that in 1958 Sadhu Ram Bana Ram was doing well in his business. It became impossible to sell the property in 1960 by public auction because of a "slump" in the property market in consequence of the Congo political crisis of that year, which could not have been foreseen in 1957.

The defendant has admitted having advised the plaintiff company to buy the property for Shs. 50,000/-, and that in 1959 it was his opinion that the property should not be sold as the property market was still good and there were good prospects that the mortgage debt would be paid by the mortgagor.

In his address to the court, counsel for the defendant submitted that it has not been established that the defendant was negligent in his duty as advocate and solicitor. Counsel for the defendant has contended that it was not the duty of the defendant to engage a surveyor or an estate agent for the valuation of the property before advising the plaintiff company to advance money on it. It was

for the plaintiff company to arrange for the proper valuation of the property on receiving the particulars from the defendant. Counsel also contended that on the authority of *William Abercrombie Shaw v. Frederick Chater Jack* (1), the defendant cannot be held liable in damages since the loss to the plaintiff company has resulted from a general fall in the price of property. For, if the mortgaged property had been sold in 1959 when it was due for redemption no loss would have occurred.

For the plaintiff company, counsel has submitted among other things, that negligence has been proved and that it was the duty of the defendant to have engaged a surveyor or an expert to have valued the property before advising the plaintiff company to invest in it, since the defendant well knew that the money was intended for investment. He has contended that *William Abercrombie Shaw v. Frederick Chater Jack* (1), referred to and relied upon by the defendant was not of any assistance to him as the Privy Council in that case had held that where a solicitor failed to obtain the advice of an expert on the value of property before advising his client to invest in such property such failure would constitute negligence. In his submission the defendant was negligent in not having had a proper valuation of the property made before advising the plaintiff to invest in it. Counsel for the plaintiff cited and relied on *Hedley Byrne & Co. Ltd. v. Heller Son & Co. Ltd.* (2).

On the evidence and from the submissions by counsel three questions have emerged for consideration and determination by the court, namely:

- (1) Was it the duty of the defendant to have had a proper valuation of the property made before advising the plaintiff as his client to invest money in it?
- (2) Was the property adequate security for the money advanced in 1957?
- (3) Can the defendant be held liable in the circumstances of this case?

I propose to consider the evidence in the light of these questions in order to ascertain what facts have been established at the same time dealing with the issues of law which have been raised and argued by counsel in their submissions.

It seems to me that implied in the first question is the further question concerning the duty which an advocate acting as solicitor, owes to his client with particular reference to investments in securities or mortgages. The most important contention in this case on behalf of the defendant is that it was not his duty to engage a surveyor or estate agent for the proper valuation of the property mortgaged before advising the plaintiff to invest its money in it.

On the evidence it is established, I think, that the defendant was engaged and acted as the advocate and solicitor to the plaintiff company, a private limited liability company, from 1956 to 1958. Of that there is no dispute. Nor indeed is there any dispute that when in 1957 by his letter and the attachments thereto, Exs. A.2 and A.3, the defendant had advised it to invest Shs. 60,000/- in the property known as Plot No. 18 Kanjokya Street, Kampala he had acted as the advocate and solicitor of the plaintiff company, and that his advice was given to the latter in that capacity. That issue I find has clearly been established by the evidence.

It is however the defendant's case that before advising the plaintiff in the terms of his letter, Exs. A.2 and A.3 he had personally inspected the property in the company of an estate agent and that he was satisfied that the property was in 1957 worth Shs. 120,000/- and therefore a sound investment for Shs. 60,000/-. If it were true that an estate agent had accompanied the defendant (presumably to assist in assessing the value of the property) when he inspected the property for the purpose of assessing its value it is a matter for surprise that the defendant at the hearing was not able even to remember the name of the



estate agent. I think it is highly improbable that any estate agent did accompany the defendant

during his inspection of the property, and, in any case, the visit appears to have been somewhat casual and unbusinesslike.

It is also strange that in none of his several letters to the plaintiff company was the name of any estate agent mentioned as having assisted in the assessment of the value of the property. One certainly would have expected that information to be given to the plaintiff company, particularly when in its letter of June 1, 1957 (Ex. A.7) it complained that a broker had valued the property as worth only Shs. 60,000/-.

On the evidence I am satisfied and find as a fact that before advising the plaintiff company the defendant did not engage, nor did he seek the advice of either a surveyor or an estate agent, as to the then market value of the property known as Plot No. 18 Kanjokya Street, Kampala. I, however, accept the defendant's evidence that he did inspect the property, but I find that in assessing the value of the property the defendant had depended entirely on his personal knowledge and on information supplied to him by the proprietor/mortgagor, Sadhu Ram Bana Ram. There is no doubt whatsoever in my mind that the defendant's letter and the attachment thereto, Exs. A.2 and A.3 contain only his personal opinion derived principally from information supplied to him by Sadhu Ram Bana Ram as to the value of the property.

The question then is, was the duty which the defendant owed to the plaintiff company as his client sufficiently discharged by the defendant merely inspecting the property and obtaining information only from the prospective mortgagor and basing his assessment of the value of the property on such information only? Or was it also the duty of the defendant, as has been contended by the counsel for the plaintiff company, to have had the advice of an expert valuer or an estate agent before advising the plaintiff company to invest its money on the mortgage of the property as a sound security?

For the defendant counsel submitted that it was not his duty to have engaged a surveyor or an expert valuer to assess the value of the property and that it was the duty of the plaintiff company to have done so. His authority for this proposition is said to be *Shaw v. Jack* (1), already cited above, to which I shall revert in the course of this judgment.

The question which has been raised in this case is a very important one of law as it concerns the duty which an advocate or solicitor owes to his client. To attempt to answer it, I think it is necessary to consider briefly the principles of law governing the relationship between an advocate and his client in so far as such principles are relevant to the circumstances of this case.

In the old English case of *John Hart & W. Hodge v. John Frame, Son & Co.* (3), it was laid down as a general principle of law that in undertaking a client's business an Attorney or Agent in England or Scotland undertakes on his own part for the existence and the due employment of skill and diligence. Where an injury is sustained by his client in consequence of the absence of either he is responsible to his client for such injury.

In *Purves v. Landell* (4), which was an action against a Writer to the Signet for negligence, Lord Brougham had said, *inter alia*:

"But it is of the very essence of this action that there should be a negligence of a crass description, which we call – crassa a negligentia – that there should be gross ignorance – that the man who has undertaken to perform the duty of an attorney, or an apothecary (as the case may be), should have undertaken to discharge a duty professionally, for which he was very ill qualified, or, if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer, or deprive him of the benefit which he had a right to expect from the service."

And Lord Campbell said:

“But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence; because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable.”

Applying the principles enunciated in the case referred to above to the facts and circumstances of the instant case it is patently obvious that when the defendant undertook to advise the plaintiff company to invest on the mortgage of Plot No. 18 Kanjokya Street, Kampala, he gave the plaintiff company to understand that he was duly qualified professionally to discharge such a duty with skill, honesty and diligence. The defendant had a duty to exercise reasonable care in his judgment and in the expression of his opinion as to the value of the property. The plaintiff company had a right to expect the honest and reasonable exercise of such skill and diligence from the defendant in the discharge of his obligations. It was entitled to rely on whatever information was supplied and whatever opinion was expressed by the defendant on the value of the property and the soundness of the security since the defendant well knew that the transaction was an investment. The relationship of advocate and client is one based on contract and on fiduciary relationship which imports confidence, and the plaintiff company was entitled to trust and rely on the judgment of its advocate. When therefore the defendant wrote in his letter, Ex. A.3: “In my opinion this security is quite sound;” one would normally have expected the defendant as an act of prudence to have had a proper valuation of the property made before coming to that conclusion. On the contrary no such valuation was ever made. The defendant is of course not a qualified valuer and it would seem not competent to have expressed such definite and positive opinion as to the soundness of the security.

In his letter, Ex. A.3, the defendant had written to the plaintiff company:

“the proprietor has spent Shs. 120,000/- on the building and sometime back he was offered the said sum. The owner is living himself in the house. There is a bank caveat to secure an overdraft of Shs. 50,000/-.”

And in Ex. A.9 he wrote:

“About Sadhu Ram Bana Ram’s property, please do not worry. The plot is today offered Shs. 100,000/-. Value of the residential houses at Kololo has not very much gone down. I do not think the value of Kampala properties will go down to a considerable extent. The other day there was a plot at Wandegeya on which there was Haveli Ram’s mortgage for Shs. 40,000/-. Nobody expected that it would realize more than Shs. 60,000/- in the auction. But actually it was sold in the auction for Shs. 85,000/-.”

Suffice it to observe that at the hearing of this case no attempt was made by the defendant to call evidence to substantiate these expressions of opinion and the particulars given in these letters by him. The mortgagor, for instance, was not called by him, nor was the man who had offered to pay Shs. 100,000/- for it. In giving his opinion as to the value of the property in question I am satisfied and find as a fact that the defendant had chosen to rely mainly on his own knowledge of the value of the property; and I hold that he did so at his own risk.

I am however inclined to the view that the mere failure to have engaged a surveyor or an estate agent or any other qualified person to value the property before advising the plaintiff company to invest in it, taken by itself, cannot amount

to negligence, and that for such an act of omission to amount to negligence it must be shown that the property was worth far less than the value assessed by the defendant. That then brings me to a consideration of the issue as to the value of the property and as to its adequacy as security for the loan of Shs. 60,000/- in 1957.

In his evidence the defendant says that he was satisfied then, as now, that in 1957 the property Plot No. 18 Kanjokya Street, Kampala, was worth the sum of Shs. 120,000/- and that it was adequate security for the sum of Shs. 60,000/- then lent to Sadhu Ram Bana Ram by the plaintiff company. The evidence, which I accept on this point, is that which was given by Martin Heyman (P.W. 3), who I am satisfied is an expert valuer. He is a Chartered Surveyor and Chartered Land Agent resident in Kampala. He has been in practice in Kampala for the past eleven years. His opinion, which I accept, is that the house was built in 1950 and that the value of the property in January, 1957 was approximately Shs. 45,000/-. In cross-examination these were his answers to questions put to him by counsel for the defendant:

“Q. In 1956 you valued the property in dispute?

A. Yes. That was in July, 1956. I had then assessed it at Shs. 53,000/- less Shs. 2,000/- for repairs to be effected.

Q. You know that Plot No. 28 Kanjokya Street was sold for Shs. 75,000/- in 1955?

A. I should not be surprised about that.

Q. Why not?

A. The market up to the beginning of 1955 was a very strong market for properties. But about April-May, 1956, the credit ‘squeeze’ started and supplies of finance for building and mortgage started to get more difficult and continued to drop. The market remained depressed until after Independence in 1962 when the market became strong. The Congo crisis of 1960 did not have a depressing effect on the class of property in dispute in this case, which is property for the working class people.

Q. Put, that the property in question was a perfectly sound security for a loan of Shs. 60,000/- in 1957.

A. I disagree with that.”

With the opinion of Martin Heyman (P.W. 3) I contrast the opinion of the defendant as contained in his letters, Exs. A.2, A.3 and A.9. In 1957 the defendant had said:

“Value of the residential houses at Kololo has not very much gone down. I do not think the value of Kampala properties will go down to a considerable extent.”

And also in Ex. A.2 the defendant had said that the proprietor of the building had spent Shs. 120,000/- in building it. The contrast between the opinion of the defendant and that of Martin Heyman (P.W. 3) is quite obvious.

In the circumstances and accepting the evidence of Martin Heyman as I do, I hold that the property known as Plot No. 18 Kanjokya Street, Kampala was not adequate security for the loan of Shs. 60,000/- in 1957, when the loan was granted and that in assessing the value of the said property at the sum of Shs. 120,000/- the defendant failed to exercise that due care, skill and diligence expected of him in the discharge of his duty to the plaintiff company as his client in that he failed to make adequate enquiries as to the value of the property and also failed to engage the services of a surveyor or an estate agent or a valuer

and thereby failed to have a proper valuation of the property made before advising his client, the plaintiff company, to invest in it. I am satisfied that the defendant was perfunctory and reckless in stating the value of the property to be Shs. 120,000/- as I am of the opinion that he had no reasonable ground upon which to base that judgment, having regard to the opinion of Martin Heyman (P.W. 3), as to the original cost of building the house and also that from 1956 the property market was depressed and continued so until after Independence in 1962.

It has not been suggested and I draw no inference from this conduct on the part of the defendant, that the defendant was to gain any improper advantage from the transaction. Indeed there is no evidence concerning that before me, and I do not think that the defendant did derive any benefit therefrom. But it is clear that there was no reasonable ground for the assessment of the value of the property at Shs. 120,000/-. On a consideration of the whole of the evidence in this case I am of the opinion that the defendant was not only negligent in the discharge of his duty to his client, but that he also committed a breach of that duty. For as was said in *Shaw v. Jack* (1), already quoted above, by the Privy Council in what may be described as an obiter dictum:

“If the only issue in the case was whether the appellant had been negligent in this respect their Lordships would have had no difficulty in agreeing with the conclusion of the Court of Appeal. They think that it was the duty of the appellant to have had a proper valuation made, and that what he did in this behalf was most perfunctory. If he chose to rely, as he evidently did, mainly upon his own general knowledge of farms in the Trans Nzoia District, he undoubtedly did so at his own risk, and if his judgment is shown to have been at fault, and the loss which the respondent suffered was the result of this breach of duty to his client, he could not escape the liability which the Court of Appeal placed upon him.”

With this opinion I respectfully agree, and hold it to apply with great force to the facts and circumstances of this case. See also *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* (2).

Now it was submitted that the defendant cannot be held liable in damages since the loss sustained by the plaintiff company has resulted from a general fall in the price of property in Kampala, and on the ground that if the property had been sold in 1959 when the mortgage was redeemable and the mortgagor had defaulted no loss would have resulted. This submission I must reject as it appears to overlook the admission by the defendant under cross-examination that he was himself of the opinion that the property should not be sold, and that he did not advise the plaintiff company to enforce its security by selling the mortgaged property then because the property market was good, and he himself had thought that the mortgagor would pay the debt according to his promise to do so.

The damage claimed by the plaintiff company is the sum of Shs. 27,389/55 made up as follows:

|  | Shs.     |
|--|----------|
| (i) Loss incurred by selling property at Shs. 45,000/-   | 22,130/- |
| (ii) Interest on Shs. 22,130/- at twelve per cent. per annum from<br>2.2.1961 to January, 1963 | 5,259/55 |

There is no evidence as to what the property would have fetched if it had been sold in 1959, although the defendant said in his evidence that if he had been instructed to sell the property in 1959 he would have sold it for more than the sum of Shs. 60,000/-. That evidence is in the nature of speculation and I therefore disregard it. I am satisfied that the property was not sold in 1959 because of the intervention of

the defendant (See Exs. A.20, A.21 and A.25) and that the

conduct of the plaintiff company in not insisting on the enforcement of the security in 1959 was not unreasonable in the circumstances of this case.

In the result I am of opinion that the defendant is liable in damages for his negligence; and I think that the sum of Shs. 27,389/55 claimed by the plaintiff company is reasonable in the circumstances. I would enter judgment for the plaintiff company against the defendant and award it the sum of Shs. 27,389/55 as damages for the defendant's negligence, with costs. Judgment accordingly.

*Judgment for the plaintiff company.*

For the plaintiff:

*PJ Wilkinson, QC and MV Jobanputra  
Jobanputra & Pandya, Kampala*

For the defendant:

*REG Russell  
Russel & Co, Kampala*

## **Shabudin Merali and another v Uganda** [1963] 1 EA 647 (CAK)

**Division:** Court of Appeal at Kampala  
**Date of judgment:** 6 November 1963  
**Case Number:** 113/1963  
**Before:** Sir Trevor Gould V-P, Crawshaw and Newbold JJA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Uganda – Udo Udoma, CJ

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*[1] Appeal – Powers of court on second appeal – Ruling at trial of no case to answer – Ruling reversed on first appeal – Grounds of misdirection – Further appeal.*

*[2] Practice – Appeal – Powers of court on second appeal – Ruling at trial of no case to answer – Ruling reversed on first appeal – Grounds of misdirection – Further appeal on grounds of misdirection.*

### **Editor's Summary**

The two appellants were charged under s. 307 (a) and s. 109 (c) of the Penal Code with arson and with giving false information to a person employed in the public service. At the close of the prosecution case the magistrate ruled that neither appellant had a case to answer and he accordingly acquitted them. The Director of Public Prosecutions thereupon appealed under s. 325 of the Criminal Procedure Code on the

ground that the acquittal was erroneous in law and the Chief Justice, who heard the appeal, held that the ruling of the magistrate was wrong, set aside the acquittal and ordered a re-trial. In his judgment the learned Chief Justice, after setting out certain salient facts continued: "It is probable that if the learned magistrate had properly directed his mind to these facts among others his ruling would have been different." On further appeal, it was contended for the appellants that the Chief Justice had misdirected himself by adopting an incorrect approach to the question of law involved and that, instead of considering whether a reasonable court could have made the order, he substituted his own opinion that a case had been made out. It was argued the words quoted showed that the Chief Justice considered that the magistrate was wrong only as a matter of probability. Counsel for the appellants also complained that the latter part of the following passage of the judgment amounted to a misdirection: "No doubt circumstantial evidence must be carefully examined so as to eliminate the possibility of a miscarriage of justice. But such examination can only properly be done after hearing the evidence of the defence."

**Held –**

- (i) although the judgment of the learned Chief Justice did not specifically set out the question of law for his determination, he did not necessarily misdirect himself; in any event the appeal must still be dismissed even if the approach of the learned Chief Justice was in question;



- (ii) there was ample reason for the reversal by the High Court of the magistrate's order and the Court of Appeal has wide power under Rule 41 as modified by Rule 48 (*h*) of the Eastern African Court of Appeal Rules, 1954, to make such order as to it may seem just and to exercise any power which the first appellate court might have exercised.
- (iii) a retrial was an unusual order to make in the circumstances; it was undesirable that the prosecution should have an opportunity of presenting its case anew and with the benefit of familiarity with the arguments used in the appeals.

Appeal dismissed. Order for retrial set aside. Order substituted that the case be remitted to the magistrate to continue the hearing on the basis that there is a case for the appellants to answer.

#### **Case referred to:**

- (1) *Fazelabbas Sulemanji and Another v. R.* (1955), 22 E.A.C.A. 395.

#### **Judgement**

**Sir Trevor Gould V-P:** read the following judgment of the court: The two appellants (respondents on first appeal to the High Court) were charged in the District Court on one count of arson contrary to section 307 (*a*) of the Penal Code of Uganda and each separately upon counts of giving false information to a person employed in the public service contrary to section 109 (*c*) thereof. At the close of the prosecution case the learned magistrate ruled that neither appellant had a case to answer and he accordingly acquitted them. The Director of Public Prosecutions appealed to the High Court under section 325 of the Criminal Procedure Code which permits an appeal against such an acquittal on the ground that it is erroneous in law. In the High Court the appeal was heard by the learned Chief Justice who held that the ruling of the magistrate was wrong, allowed the appeal, set aside the order for acquittal and ordered a retrial of the appellants. On appeal to this court, which also lies only upon a question of law, we dismissed the appeal except insofar as we set aside the order for retrial and substituted an order that the case be remitted to the magistrate to continue the hearing on the basis that there is a case for the appellants to answer. We now give our reasons for that decision.

The question of law for the High Court was whether the decision of the magistrate that no *prima facie* case had been made out was one at which a reasonable court, properly directing itself, could arrive. As to the question in this court, it was held in *Fazelabbas Sulemanji and another v. R* (1), (1955) 22 E.A.C.A. at p. 397 that, "where the High Court has reversed a judgment of a subordinate court, it must always . . . be a question of law whether there existed sufficient reasons for such reversal".

The appellants were accused of setting fire to their own shop building and of falsely stating to the police that thieves had broken in and set fire to it. The evidence is fully set out and considered in the judgment of the learned Chief Justice and we do not propose to repeat it. We are fully satisfied that it disclosed a *prima facie* case of such strength that no reasonable court could properly hold to the contrary: we remain of that opinion despite the able argument of Mr. Kapila in which he sought to show that the learned Chief Justice had not fully appreciated certain aspects of the evidence. In our opinion the argument did not measurably detract from the effect of the substantial body of evidence.

It was contended, however, that the learned Chief Justice misdirected himself by adopting an incorrect approach to the question of law involved, and that instead of considering whether a reasonable court

could have made the order he

substituted his own opinion that a case had been made out. It is true that in his judgment the learned Chief Justice did not specifically set out the question for his determination in relation to a question of law. That does not necessarily mean that he did misdirect himself. The following passage in his judgment however was relied upon by counsel for the appellants and may provide some support for the suggestion.

“On a careful analysis of the evidence that was before the court I have come to the conclusion that the learned magistrate was wrong in his ruling. He did not appear to have directed his mind properly and to have given sufficient consideration to the following facts:

- (1) All throughout the night of the incident the two nightwatchmen, Bruno Otobi (PW. 1) and Karlo Boyi (PW. 2) were not only keeping watch at the shops but were frequently perambulating the whole premises. They never went anywhere else, so that if thieves had visited the house or the shops it is quite probable that they would have known or at least heard noises about.
- (2) The only communicating door between the bedroom or the dwelling part of the house and the shop remained intact. It was still locked. There was no evidence of it having been broken by anyone. There was no other means of entering the shop from the dwelling house.
- (3) The conduct of the second respondent in refusing to speak to Bruno Otobi (PW. 1) when interrogated as to what had happened or as to whether he was burning red ants in the shop.
- (4) The conduct of the first respondent in preventing Bazilie (PW. 5) from breaking open the door of the shop. On that occasion the first respondent actually dragged away Bazilie (PW. 5) from the door when the latter, with an axe in hand, attempted to gain access into the shop with a view to fighting the fire.
- (5) The fact that the first respondent told Bruno Otobi (PW. 1), Karlo Boyi (PW. 2) and Bazilie (PW. 5) to allow the shop to be burnt.
- (6) The refusal of the respondents to report the incident to the Jago Chief when advised to do so.
- (7) The fact that there were no other occupants of the house and shop except the respondents.

It is probable that if the learned magistrate had properly directed his mind to these facts among others his ruling would have been different.”

It is the last sentence in that passage which was relied upon in argument, as tending to show that the learned Chief Justice considered that the magistrate was wrong only as a matter of probability. It does not in our opinion inevitably do so; it is by way of observation and does not necessarily mean that the learned Chief Justice was not of opinion that the magistrate would have been unreasonable not to have arrived at a different finding had he so directed his mind.

It would undoubtedly have been better if the learned Chief Justice had directed himself explicitly on this question in his judgment but on the view we took of the effect of the evidence (and have expressed above) we considered that the appeal must still be dismissed even if the approach of the learned Chief Justice was in question. On that view we had no doubt that, on a proper direction, there was ample reason for the reversal by the High Court of the magistrate’s order which as indicated in the *Fazelabbas* case (1) is a question of law fit for this court. Put in another way, this court has wide power on second appeal, under rule 41, read as modified by rule 48 (*h*) of the Eastern African Court of Appeal Rules, 1954, to make such order as to it may seem just and to exercise any power

which the first appellate court might have exercised; also, under the proviso to rule 41, the court may dismiss an appeal although there may have been a misdirection, if it considers that no substantial miscarriage of justice has occurred. The dismissal of the appeal under either of those powers was warranted by our opinion that on a proper direction the learned Chief Justice's judgment would inevitably have been the same.

Counsel for the appellants complained of a further misdirection in the second sentence of the following passage of the judgment:

"No doubt circumstantial evidence must be carefully examined so as to eliminate the possibility of a miscarriage of justice. But such examination can only properly be done after hearing the evidence of the defence."

Taken literally, the words used may amount to a misdirection if they imply that the defence ought to be called upon in order that circumstantial evidence may be fully evaluated. Reading the words in their context we do not think that was the learned Chief Justice's intention. In our opinion he can only have meant that in considering circumstantial evidence, what might not be considered a reasonable hypothesis on the limited basis of the prosecution evidence, might be deemed reasonable upon hearing the evidence for both sides. On that meaning we did not consider the passage objectionable and on any approach we did not consider the point to be material in the context of the whole judgment.

Finally, we advert to the question of the order made by the learned Chief Justice. It was common ground that his powers technically included that to order a rehearing, and that course might be less embarrassing to the magistrate concerned than the order we have substituted. Nevertheless a retrial would be an unusual order in the circumstances and we considered it undesirable that the prosecution should have an opportunity of presenting its case anew and with the benefit of familiarity with the arguments used in the appeals. It was not suggested that the magistrate was not available and counsel for the Crown agreed that the order substituted was the more appropriate.

*Appeal dismissed. Order for retrial set aside. Order substituted that the case be remitted to the magistrate to continue the hearing on the basis that there is a case for the appellants to answer.*

For the appellants:

*AR Kapila and A Ishani*

*Ishani & Ishani, Kampala*

For the respondent:

*H Hebron (State Attorney)*

*The Attorney General, Uganda*

**Balwant Singh v Kipkoech Arap Serem**  
[1963] 1 EA 651 (CAN)

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 5 December 1963

**Case Number:** 5/1962  
**Before:** Sir Trevor Gould V-P, Crawshaw and Newbold JJA  
**Sourced by:** LawAfrica  
**Appeal from:** H.M. Supreme Court of Kenya – Farrell, J

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*[1] Hire purchase – Transfer of ownership – Estoppel – Agreement to hire motor vehicle – Option to purchase when instalments paid – All instalments paid – Option to purchase not effectively exercised – No time limit specified in agreement for exercise of option – Registration book of vehicle handed over to hirer – Hirer treated as having purchased – Transfer of ownership not registered – Vehicle later seized by owner – Action by hirer for trespass, conversion and detinue – Waiver of requirement to exercise option – Whether owner estopped from denying that ownership transferred.*

### **Editor's Summary**

In May, 1958 the appellant, who was the owner of a lorry, entered into a hire purchase agreement with the respondent whereby, after payment of an initial sum, the respondent was to pay a sum of Shs. 26,247/- by instalments as hire rental for the lorry and after the payment of such sum the respondent was to have the option to purchase the lorry for the sum of Shs. 20/-. By October, 1959 the respondent had paid the Shs. 26,247/- but never paid the Shs. 20/-. After payment in full of the hire rentals the appellants handed to the respondent the registration book of the lorry, filled in the name of the respondent in that book as owner, instructed the respondent to sign the book in the place reserved for the owner's signature and treated the respondent as the owner though at no time prior to May 12, 1960 was the transfer of ownership registered. On this date the lorry was seized by a court broker on the instructions of the appellant who alleged that in January, 1960, the respondent had agreed that Shs. 15,310/75 of the payments made under the agreement should be reallocated to another purpose and that, as no further payments were made by the respondent in respect of the agreement, he had instructed the court broker to seize the lorry in default of payment by the respondent of Shs. 15,310/75. The respondent sued the appellant claiming damages for trespass, conversion and detinue, and claimed the return of the lorry or its value, a claim subsequently abandoned as the lorry was returned to the respondent after the plaint was issued; the appellant counterclaimed, *inter alia*, the amount of Shs. 15,310/75 or possession of the lorry. The trial judge found that no such agreement as alleged by the appellant had been made by the respondent and that the appellant by his conduct "had waived compliance by the respondent with the requirement of paying the sum of Shs. 20/- in order to complete his title" to the lorry; and that on the pleadings the appellant had disentitled himself from relying upon the defence of failure to pay the nominal sum of Shs. 20/-. In the result the judge held that the respondent was, as from October, 1959, absolute owner of the lorry; that the court broker had unlawfully seized the lorry and awarded Shs. 9,450/- as damages to the respondent. On appeal it was submitted, *inter alia*, that having regard to the pleadings and the finding that the nominal price had not been paid, it was not open to the judge to do otherwise than dismiss the plaint and give judgment for the appellant on the counterclaim; and that as the respondent had pleaded acquisition of ownership by payment he could not therefore rely on acquisition of ownership by waiver or estoppel.

**Held –**

- (i) the conduct of the appellant represented that he had transferred the ownership of the lorry to the respondent and, under s. 115 of the Indian Evidence Act, 1872, he was estopped from denying that ownership of the lorry had been transferred to the respondent;
- (ii) the appellant, though remaining the owner until the option to purchase was effectively exercised, was not entitled under clause 4 (1) of the agreement to resume possession of the lorry until he had given to the respondent notice calling upon him either to exercise the option and pay the price or to give up possession of the lorry and the respondent had, after a reasonable time, failed to do either.

Appeal dismissed.

**Cases referred to in judgment:**

- (1) *Nurdin Bandali v. Lombank Tanganyika Ltd.*, [1963] E.A. 304 (C.A.).
- (2) *Credit Finance Corporation Ltd. v. Harcharan Singh Ranbutta*, [1961] E.A. 231 (C.A.).
- (3) *Ilkiw v. Samuels*, [1963] 2 All E.R. 879.
- (4) *The Hebridean Coast*, [1961] 1 All E.R. 82.
- (5) *The Greta Holme*, [1897] A.C. 596.

December 5. The following judgments were read:

**Judgement**

**Newbold JA:** This appeal raises a question arising out of a hire purchase agreement on which, as far as I am aware, there is no authority. The question is, what are the respective rights of the owner and the hirer of a vehicle when the hirer has completed payment of the hire rentals but has not exercised effectively his option to purchase and there is no time specified in the agreement in which it is to be exercised.

At the trial a number of subsidiary matters were in issue, but for the purpose of this appeal the essential facts, as either admitted or found by the trial judge, are as follows. On May 15, 1958 the appellant, who was the owner of a lorry, entered into a hire purchase agreement (hereinafter referred to as “the agreement”) with the respondent whereby, after payment of an initial sum, the respondent was to pay a sum of Shs. 26,247/- by instalments as hire rental for the lorry and after the payment of such sum the respondent was, under clause 3 (b) of the agreement, to have the option to purchase the lorry for the sum of Shs. 20/-. The respondent completed payment of the sum of Shs. 26,247/- in October, 1959, but at no time paid the Shs. 20/-. On completion of the payment of the hire rentals the appellant handed to the respondent the registration book of the lorry, filled in the name of the respondent in that book as owner, instructed the respondent to sign the book in the place reserved for the owner’s signature and treated the respondent as the owner though at no time prior to May 12, 1960 was the transfer of ownership registered. The appellant alleged that in January, 1960 the respondent agreed that Shs. 15,310/75 of the payments made under the agreement should be reallocated to another purpose and that, as no further payments were made by the respondent in respect of the agreement, he instructed a court broker to seize the lorry in default of payment by the respondent of that sum of Shs. 15,310/75. The judge found that no such agreement had been entered into by the respondent and that on May 12, 1960 the court broker,

acting on the instructions of the appellant, seized the lorry by removing the air cleaner and that the lorry remained at Anambukoi Market until July 13, when the court broker returned the air cleaner and the respondent regained possession of the lorry. On June 28, 1960 the respondent filed a plaint claiming that all sums due under the agreement had been paid and that in October, 1959 he had exercised his right to purchase the vehicle and became the absolute owner

thereof and that the lorry had on May 12, 1960 been unlawfully seized and possessed by the court broker acting on the instructions of the appellant. The plaint, though it is by no means clear, appears to be in trespass, conversion and detinue, claims the return of the lorry or its value, a claim subsequently abandoned as the lorry was returned after the plaint was issued, and also claims as damages the sum of Shs. 250/- per day (which sum is described as the net loss of business) from the date of seizure of the lorry until its return. The defence of the appellant alleges that the sum of Shs. 15,310/75 was due under the agreement, denies that the respondent had the right at any time to exercise the option to purchase, and also alleged that the appellant had instructed the court broker to seize the lorry in default of payment of the said sum, but that the respondent had prevented him from doing so with the result that no seizure or repossession had taken place; and the appellant counterclaimed, *inter alia*, for the amount of Shs. 15,310/75 or for possession of the lorry. In his reply the respondent denied the allegations set out in the defence and counterclaim.

The judge held that the respondent had paid all the amounts due by way of hire rental under the agreement but had not paid the Shs. 20/- payable on the exercise of his option to purchase. The judge further held that the appellant by his conduct "had waived compliance by the plaintiff with the requirement of paying the nominal sum of Shs. 20/- in order to complete his title to the vehicle" and he also stated that on the pleadings he was inclined to the view that the appellant had disintitiled himself from relying upon the defence of failure to pay the nominal purchase price. In the result the judge found that the respondent was, as from October, 1959 absolute owner of the vehicle and that the court broker had on May 12, 1960 on the instructions of the appellant, unlawfully seized the lorry and that the lorry remained seized until July 13, 1960. As regards damages for loss of profit, which, as the lorry had been returned, was all that the respondent claimed at the trial, the judge came to the conclusion that the respondent was entitled to a sum of Shs. 150/- per day in respect of the loss of profit of which the respondent had been deprived by the action of the appellant and the court broker; and accordingly he gave judgment on the plaint in favour of the respondent for the sum of Shs. 9,450/- against the appellant and the court broker jointly and severally and dismissed the appellant's counterclaim.

From this judgment the appellant appealed on four main grounds and he submits that if he succeeds on either of the first two grounds he would be entitled to an order on the counterclaim for the delivery of the lorry to him.

As to the first ground, which is that having regard to the pleadings and the findings that the nominal purchase price had not been paid it was not open to the judge to do otherwise than dismiss the plaint and give judgment for the appellant on the counterclaim, I agree that the pleadings are by no means satisfactory. It is, however, clear from the record that at the trial the attention of the judge and of counsel for all parties was directed to examination of whether the ownership of the lorry could be regarded as transferred to the respondent having regard to the conduct of the parties even if the nominal purchase price had not been paid; and the first issue framed by the judge required on the facts found a decision on this point. Paragraph 5 of the plaint alleges that all sums under the agreement had been paid and that the respondent had exercised his right to purchase the lorry and had become the owner thereof. The defence denies that all sums due had been paid or that the respondent had at any time the right to exercise his option to purchase the lorry or to become owner thereof. The reply, in this respect, merely denies that any sum was due under the agreement. The appellant submits that the respondent has pleaded acquisition of ownership by payment and cannot therefore rely on acquisition of ownership by waiver or estoppel; and that on the finding of non-payment the appellant becomes immediately entitled to judgment in his favour on the plaint and counterclaim.



If a plaintiff relies on either waiver, which is based on contract, or estoppel, which stems from a rule of evidence (see *Nurdin Bandali v. Lombank Tanganyika Limited* (1)([1963] E.A. at p. 314)) the facts giving rise to these pleas are material facts and should be pleaded (see Order VI, rules 1 and 5). There is, however, this difference between the two pleas: waiver gives rise to a cause of action and if the claim is based on waiver the facts should be pleaded in the plaint; but estoppel merely enables an independent cause of action to succeed by preventing a defence from being raised and thus the facts relating to estoppel would normally be pleaded in the reply and not in the plaint. Here the plaint averred that the respondent had become the owner. The defence was that the respondent neither in October, 1959, nor at any other material time since, had the right to exercise the option to purchase. Thus the defence did not raise the issue that the respondent, though having the right to exercise the option, did not exercise it effectively by paying the nominal purchase price. If that had been the defence it would then have been incumbent on the respondent to plead in his reply the facts upon which he relied as showing that the appellant should be estopped from saying that the option to purchase had not been effectively exercised. I think that in any event it would have been wiser for the respondent to have pleaded the facts relating to estoppel in his reply but, as I have pointed out, the case was conducted as if such a plea existed and I do not think that the appellant was in any way prejudiced thereby. At the hearing of the appeal the respondent applied for leave to amend the plaint in such a manner as to plead the facts relating to estoppel. The appellant objected to the amendment and we reserved our decision on the application. As I have said the application should more properly be to amend the reply, but I must deal with the application as it exists. This court clearly has power to allow amendment at this stage (see Order VI, rule 28 and *Credit Finance Corporation Ltd. v. Harcharan Singh Ranbutta* (2)), and I would allow the amendment on the well-known principle that the amendment should be allowed where it is merely a case of setting out in the pleadings what has emerged as an issue during the course of the trial and where no justice is caused thereby. In my view the amendment will not cause any injustice to the appellant for this reason. The respondent was in lawful possession of the lorry at the time of the seizure and the claim in trespass can, on the facts of the case, be defeated only if the appellant is entitled to repossess the lorry; this entitlement in turn depends on the failure of the respondent to exercise effectively his option to purchase and this was an issue which the appellant failed to raise, as he should have done, in his pleading.

As to the second ground, which was that on the facts found it could not properly be held either that the appellant had transferred the property in the lorry but had waived payment of the nominal purchase price or that he was estopped from saying that he had not transferred the ownership, as I have said the judge held that the appellant had waived payment of this sum. The appellant submitted that waiver can only exist as a term of a valid contract (see *Nurdin's* case (1)), and that no contract with such a term could properly be implied in this case. I agree; for one thing it is a little difficult to see the consideration for any such implied contract and I find it as difficult to imply a contract whereby the appellant agreed to give up his right to the Shs. 20/- as I would to imply a gift of this lorry by one business man to another. Each of these contingencies is possible, with the result that ownership could be transferred without the payment of the nominal purchase price, but neither an amending contract nor a gift has been pleaded and in any event I do not think the facts would justify either conclusion. Where a party asserts an amending contract it is incumbent on him to prove that both parties intended the original contract to be amended as alleged. But it is a common error to refer to a waiver when what is meant is an estoppel, and in my view that has been done in this case. I consider that

what the learned judge truly held in his judgment was that the appellant was by reason of his conduct estopped from saying that ownership of the lorry had not been transferred, even though the respondent had not paid the nominal purchase price and the appellant had no intention of foregoing his right to the Shs. 20/-.

It is to be noted that in this agreement, unlike most hire purchase agreements, the nominal purchase price is not added to the last of the hire rentals nor is it referred to in the figures inserted in the schedule to the agreement. It is to this schedule, which has the details of the lorry and of the amount which has to be paid by way of hire rental, that a person such as the respondent would look in order to ascertain how much would have to pay in order to achieve his object in entering into the agreement, that is ultimately the ownership of the lorry. When the payments set out in the schedule had been completed the appellant handed to the respondent the registration book with the respondent's name endorsed in it as owner and showed the respondent where to sign as owner. In the circumstances, what can the acts of the appellant be other than a representation that the appellant had transferred the ownership of the lorry to the respondent? The fact that he had not done so or that he may not have intended to do so is immaterial – his conduct was the representation of an existing fact, that is that the ownership had been transferred, and the respondent reasonably believing this to be true acted on it in the sense that he refrained from paying the nominal purchase price. The facts of this case come four-square within section 115 of the Evidence Act, 1872, and I have no doubt in coming to the conclusion that the appellant should not be allowed to say that he had not transferred the ownership of the lorry to the respondent. The appellant submits that the registration book is not a document of title to the lorry. I accept that, though the registered owner is presumed to be the owner unless the contrary is proved (see section 8 of the Traffic Ordinance (Cap. 403)) and therefore an officially confirmed entry of the name of the owner in the registration book is evidence of title. The important point, however, is not whether the registration book is a document of title or evidence of title but whether the manner in which the appellant dealt with it was intended to, and did, result in the respondent believing that he was the owner of the lorry. As I have said, I have no doubt that the appellant is estopped from denying that the ownership in the lorry had been transferred by him to the respondent after payment of all the hire rentals even though the nominal purchase price had not been paid. I should, however, wish to emphasize that there is no doubt in this case that the respondent intended to exercise his option to purchase and nothing that I have said is intended in any way to cast doubt upon the basic provision of a hire purchase agreement, which is that property does not pass until the option of purchase is validly exercised. But even if the appellant had not been estopped from denying that he had transferred the ownership of the lorry I do not consider he would have been entitled to succeed. The respondent had paid all the hire rentals and was lawfully in possession of the lorry. He was entitled to exercise his option to purchase the lorry and to acquire ownership on payment of the nominal purchase price. No time is laid down in the agreement within which he is to exercise the option and pay the purchase price. In my view the appellant, though remaining the owner until the option to purchase was effectively exercised, was not entitled under cl. 4 (1) of the agreement to resume possession of the lorry until he had given to the respondent notice calling upon him either to exercise the option and pay the purchase price or to give up possession of the lorry and the respondent had, after a reasonable time, failed to do either. Having regard to my views on the estoppel point there is no need to say anything further on the fact that the seizure in this case took place without the respondent being given an opportunity to exercise the option to purchase and to pay the nominal purchase price.

As to the third ground, which was that in law there was no seizure as possession of the lorry did not pass from the respondent to the court broker, I find no difficulty in coming to the conclusion that there is no merit in this submission. To say that because the ignition key remained with the respondent and because he could physically move the lorry without the air cleaner, which had been taken away by the court broker, therefore he still retained possession of the lorry is in my view a fallacy. The judge has found, and there was abundant evidence to justify the finding, that all parties regarded the lorry as having been taken from the respondent and, through the court broker, given to the appellant. It was the right to resume possession given by cl. 4 (1) of the agreement which the appellant, through the court broker, was purporting to exercise and which the court broker stated in writing on May 12, 1960 he had exercised. The fact that physically the respondent could take possession of the lorry does not mean that the right to lawful possession of the lorry remained in him, or, to put it more correctly having regard to the facts of this case, that his right to lawful possession of the lorry had not been infringed.

As to the fourth ground, the appellant submits that the loss claimed is special damage and unless it is pleaded with full particulars and evidence given supporting those particulars, neither of which he submits was done, then the claim is not sustainable. He also submits that in any event, as no evidence was given of the respondent hiring another lorry, the only damages to which the respondent was entitled was the interest on the capital value of the lorry and that the case should be remitted to the Supreme Court for the determination of the question of what, if any, were the damages to which the respondent was entitled. I agree that the claim is one for special damages and that special damages cannot be recovered unless they are pleaded and evidence in support of the damages given (see *Ilkiw v. Samuels* (3)). In para. 10 of the plaint the respondent pleaded that by reason of the unlawful seizure he was “suffering damages at the rate of Shs. 250/- per day being the nett loss of business from the date of seizure”. This is a sufficient pleading of special damages so as to enable the respondent to give, as he did, evidence at large on the loss of profit that he suffered. The appellant was fully entitled to call for and obtain particulars of the special damages with the object of ascertaining and restricting the nature of the damages, but he did not do so and he cannot complain now of lack of particularity. Nor do I agree that because another lorry was not hired the respondent would not be entitled to any special damages and would only be entitled to general damages based on a percentage of the capital value of the lorry. *The Hebridean Coast* (4), which is referred to in support of that submission does not, in my view, in any way support it. In that case the claim in special damages was based on the “charter of equivalent shipping space” and this claim was not proved, with the result that only general damages based on interest on the capital value of the asset to compensate for a presumed harm was allowed. In both *The Hebridean Coast* (4) and *The Greta Holme* (5), from which the practice of giving general damages based on interest on capital value is derived, it is accepted that if loss of use of an asset gives rise to special damages then these special damages are recoverable; but of course the special damages must be proved. Neither case decides that it is a condition precedent to the recovery of special damages that another vehicle should be hired to take the place of the vehicle whose use is lost before special damages for the loss of user can be claimed. It is, of course, the duty of a claimant to do all that he reasonably can to minimise the damages he suffers and the damages recoverable in each case must depend on the facts of that case. In some cases it may well be that the hire of another vehicle would be reasonable and that on failure to do so the special damages in regard of loss of profit would be restricted to hire charges necessary to carry out any contracts of carriage. But, by reason of the failure of the appellant to obtain particulars of the special

damages or to give any evidence on this question, the respondent was in the happy position of being able to give evidence of special damages in the broadest terms, a position of which he took full advantage. The only evidence on the matter before the judge was a general statement of an average net loss of Shs. 250/- per day; the judge thought this on the high side and reduced it to Shs 150/- an amount which, on the evidence before him, he thought more reasonable. In my view this was a course he was entitled to take and it was an award he was entitled to make on the unchallenged evidence before him. From that evidence the appellant must have known that seizure of the lorry would result directly in loss of profits. I confess, however, that the amount appears to me to be very much on the high side as it means that the respondent makes a net profit of about £2,700 a year from one lorry. The judge, however, has not erred in law in making the award, and the award relates to special as opposed to general damages and is supported by such evidence as is given on the matter at the trial. To substitute any other figures would be merely guesswork on an item of special damages, a course which in my view an appellate court should not take. I can see, therefore, no reason to interfere with the award even though it is considerably more than I would have given.

For these reasons I would dismissed the appeal with costs.

**Sir Trevor Gould V-P:** I agree with the reasoning and conclusions of the learned Justice of Appeal and have nothing to add.

The appeal is dismissed with costs.

**Crawshaw JA:** I also agree.

*Appeal dismissed.*

For the appellant:

*DN Khanna*

*Khanna & Co, Nairobi*

For the respondent:

*DB Kohli*

*Kohli Patel & Raichura, Kisumu*

**The Motor Mart & Exchange (Finance) Limited v Hiralal Mohanlal Gandhi  
and another**  
[1963] 1 EA 657 (SCK)

**Division:** HM Supreme Court of Kenya at Nairobi

**Date of judgment:** 5 November 1963

**Case Number:** 1603/1961

**Before:** Wicks J

**Sourced by:** LawAfrica

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*[1] Hire purchase – Guarantee – Guarantee given after execution of hire purchase agreement – Consideration for guarantee being the hiring at guarantor's request – Whether good consideration.*

*[2] Damages – Hire purchase – Hiring terminated by owner – Motor vehicle not returned to owner – Assessment of damages.*

### **Editor's Summary**

The first defendant entered into a hire purchase agreement on July 11, 1960 with the plaintiffs in respect of a motor vehicle and on July 20, 1960 the second defendant guaranteed due performance of the agreement by the first defendant. The first defendant having defaulted the plaintiffs first terminated the agreement and demanded the return of the vehicle, and subsequently sued the defendants for the instalments in arrear, return of the vehicle or its value and damages. The first defendant was served by substituted service and did not enter an appearance and the second defendant contended that since the guarantee was given after execution of the hire purchase agreement, there was no consideration and that the car was not hired to the first defendant at the second defendant's request.

### **Held –**

- (i) the vehicle was hired to the first defendant at the request of the second defendant;

- (ii) the expression “has done” in s. 2 (d) of the Indian Contract Act, 1872, connotes something done before, the vehicle was supplied to the first defendant “at the desire of the promisor”, the second defendant, and accordingly although the guarantee was executed after the hire purchase agreement there was good consideration for the guarantee;
- (iii) the plaintiffs were entitled to recover their actual damage, namely, the money they had advanced together with interest at a reasonable rate up to the time when the hiring was terminated, less the instalments paid. *Bridge v. Campbell Discount Co, Ltd.*, [1962] 1 All E.R. 385 applied.

Judgment for plaintiffs for Shs. 11,047/-.

### Cases referred to in judgment:

- (1) *Sindha Shri Ganpatsingji v. Abraham* (1895), 20 Bom. 755.
- (2) *Bridge v. Campbell Discount Co., Ltd.*, [1962] 1 All E.R. 385.

### Judgment

**Wicks J:** This case arises out of a hire purchase agreement dated July 11, 1960 between the plaintiff and the defendants in respect of a Chevrolet Belair Car Reistration No. KGQ 473. The second defendant executed a guarantee which is dated July 20, 1960. The selling price of the car was Shs. 30,514/-, financing charges Shs. 3,051/-, and the first defendant paid a deposit of Shs. 10,174/- leaving a balance of Shs. 23,391/-, which was to be paid by seventeen monthly hire rents of Shs. 1,300/- and a final hire rent of Shs. 1,291/-. The first instalment was due on August 11, 1960. The plaintiffs say that the first defendant failed to pay the monthly instalments that fell due on May 11, June 11, July 11, August 11 and September 11, 1961, amounting to Shs. 6,500/-, and it can be assumed that the nine instalments due up to May, 1961 were duly paid. The first defendant being in arrears with his instalments, the plaintiffs terminated the hire by letter on September 16, 1961 and demanded the return of the car. The first defendant has failed to pay the instalments due or to return the car, and the second defendant has failed to indemnify the plaintiff. The first defendant was served by substituted service, but failed to enter an appearance. The second defendant says that there was no consideration for the alleged guarantee, that the car was not hired to the first defendant at the request of the second defendant, there were no oral or other agreements between the plaintiff and the second defendant and the guarantee bears a true date which is subsequent to that of the hire purchase agreement. It appears from the cross-examination of the plaintiffs that the car was taken to India where it is in custody by the Indian authorities.

Counsel for the second defendant argues that, the guarantee having been entered into after the execution of the hire purchase agreement, there is no consideration, and that the car was not hired to the first defendant at the request of the second defendant. The second defendant did not give evidence nor was any evidence called on his behalf. The opening words of the guarantee are:

“In consideration of your hiring the above Vehicle to the within named Hirer at my request . . .”

and in the absence of evidence to the contrary this is accepted, and I find that the car was hired to the first defendant at the request of the second defendant. Section 2 (d) of the Indian Contract Act, 1872 which at the time applied to the contract, provides:

“When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or

does or abstains from doing, or

promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”

The expression “has done” connotes something done before, the vehicle was supplied to the first defendant “at the desire of the promisor”, that is, the second defendant, see *Sindha Shri Ganpatsingji v. Abraham* (1) and there is good consideration for the promise.

In addition to claiming the unpaid instalments the plaintiffs claim the return of the vehicle or its value and damages for its retention, and evidence was led relating to the value of the car. Almost without exception in claims arising out of the breach of hire purchase agreements, the vehicle has been repossessed or in the case of an accident resulting in a “write-off” payment under the insurance is available to the hirer and, unless there is a claim for depreciation, the value of the vehicle at the time of the breach is not in issue. In this case where the vehicle has not been re-possessed, on what basis are damages for its retention to be assessed? To take an extreme case, all the hire instalments due under a hire purchase agreement have been paid and the hirer is in breach of the agreement, say, because he failed to pay the Shs. 1/- purchase price, and the hire purchase company were unable to re-possess the vehicle, which was then worth £500; surely £500 would not be an accurate assessment of the damage suffered. In the case of *Bridge v. Campbell Discount Co., Ltd.* (2), the assessment of the damages in such cases was considered by Lord Denning, who propounded the basis to be ([1962] 1 All E.R., at p. 401):

“Now that equity and law are one, the hire purchase company should recover its actual damage, and such damage should be assessed according to the realities and not according to any fiction. The respondents should recover the money they have advanced with interest at a reasonable rate up to the time when the hiring was terminated, less the instalments already received and the sum which the car might reasonably be expected to realise when it was delivered up to them.”

That is, the plaintiffs are entitled to recover the money they have advanced together with interest at a reasonable rate up to the time when the hiring was terminated, less the instalments already received. The vehicle has not been delivered up to the plaintiffs, so no deduction should be made for it. The interest provided for under the hire purchase agreement was 15 per cent., which I find to be a reasonable rate. The sum advanced was Shs. 20,340/- and the hiring was terminated on September 16, 1961. The interest is therefore one year and sixty-seven days on Shs. 20,340/- at 15 per cent.=Shs. 2,407/-. This added to the amount lent, less Shs. 11,700/- instalments received, leaves a balance of Shs. 11,047/- which is the actual damage, and the amount that the plaintiffs are entitled to recover from the first defendant. It would seem that had the plaintiffs re-possessed the vehicle, which is said to have been worth about Shs. 20,000/- at the time of the termination of the hire, and brought an action for the instalments due and unpaid they would have recovered Shs. 6,500/- plus certain interest and had possession and title of a vehicle worth Shs. 20,000/-, that is, cash and goods to the total of Shs. 26,500/-. Why, it may be asked, should a hire purchase company receive less when the defendant has committed a further breach (by failing to return the car) than in a case where there is a single breach, that of failure to pay instalments due? The answer appeared to be this – when the hire purchase company brings its action for sums due under the terms of the contract that is one thing, and in this case the plaintiffs’ claim would be limited to the amount of the instalments due and unpaid – Shs. 6,500/-. When, however, the hire purchase company asks for more, for depreciation or damages for failure to return the car, that is another and different principles apply; then the assessment is based on



the actual damage” suffered, as explained by Lord Denning, in *Bridge’s* case (2). It would seem, though I make no ruling on it, that a hire purchase company has an option – if their calculations show that the instalments due and unpaid exceeds what they could expect to recover on a calculation of their “actual damage”, then they are entitled to bring their action for the amount of the instalments due and unpaid, but if the instalments due and unpaid are less than what they could expect to recover on a calculation of their “actual damage”, then they are entitled to claim for depreciation and/or damages for failure to return the vehicle, but if they pursue the latter course they must, in the calculation of their “actual damage”, bring into account any deposit received and instalments paid.

I am satisfied and find that the terms of the guarantee entered into by the second defendant cover the damage suffered by the plaintiff and there must be judgment against him in the like amount.

Judgment for the plaintiff against the first defendant in default, and against the second defendant, in the sum of Shs. 11,047/- together with interest at court rates from September 16, 1961, until satisfaction and costs.

*Judgment for the plaintiffs for Shs. 11,407/-.*

For the plaintiffs:

*JK Winayak*

*Winayak Johor & Co, Nairobi*

The first defendant did not appear and was not represented.

For the second defendant:

*SK Kapila*

*Khanna & Co, Nairobi*

**Samson Ngure s/o Matu v R**  
**[1963] 1 EA 660 (SCK)**

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|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 30 September 1963                    |
| <b>Case Number:</b>      | 1111/1963                            |
| <b>Before:</b>           | Rudd and Wicks JJ                    |
| <b>Sourced by:</b>       | LawAfrica                            |

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[1] *Criminal law – Maize marketing and control – Burden of proof – Charge of illegal possession of maize – Conviction of harvesting and dealing with maize contrary to law – Finding that accused must prove lawful possession and dealing – Misdirection – Maize Marketing Ordinance (Cap. 338), s. 42 (K).*

### **Editor's Summary**

The appellant was charged with his brother with “illegal possession of maize”. The particulars of the offence alleged that they illegally took into their possession 15 bags of maize “knowing or having reasonable cause to suspect that it had not been dealt with in accordance with s. 15 (2), or, as the case may be, s. 20 of the Maize Marketing Ordinance and without the written authority of the Maize Marketing Board or its agents”. The appellant’s brother was employed in Narasha forest and the appellant had also once been employed there but had been discharged, and the evidence for the prosecution was that the appellant and his brother had brought the maize to a house at Muringwa situated about a hundred yards outside the boundary of the forest. It was common ground that if the maize had been produced at Muringwa outside the forest, it would not have been illegal to take it to the house where it was found, but that if the maize had been taken there from Narasha forest such removal would have been unlawful. In an unsworn statement the appellant said that he had produced the maize at Muringwa outside the forest. The magistrate convicted the appellant and his brother for failing to comply with the provisions of s. 15 (2) of the Ordinance and imposed a fine of Shs. 300/- or two months’ imprisonment in default and in

addition ordered confiscation of the maize. In his judgment the magistrate held that under s. 42 of the Ordinance the onus was on the appellant and his brother to satisfy the court that they were dealing legally and properly with the maize and that all the circumstances of their transactions and possession were lawful. On appeal,

**Held –**

- (i) the magistrate's directions regarding the onus of proof under s. 42 of the Maize Marketing Ordinance had overstated the extent of the onus imposed by that section and were misdirections;
- (ii) the appellant and his brother had to prove the origin of the maize in so far as that was material and they had to prove the circumstances of their possession and transactions, but failure to do either of these did not constitute an offence per se;
- (iii) the onus of proof as to the origin of the maize and as to the circumstances of their possession had not been discharged to the satisfaction of the court and these two failures justified the order for confiscation of the maize or at least its continued detention until the onus had been discharged, but they did not justify a finding, in the absence of evidence which could have been produced by the prosecution and was not produced, that s. 5 (2) had not been complied with so as to constitute an offence under s. 15 (3) nor, does failure per se to discharge the onus justify conviction under s. 23 (1);
- (iv) in view of the difference between the charge and the conviction and the misdirections as to the extent of the onus cast by s. 42, the conviction and sentence of the appellant could not stand.

Appeal allowed. Conviction and sentence set aside. Order for confiscation of the maize confirmed.

**No cases referred to in judgment**

**Judgment**

**Rudd J:** read the following judgment of the court: The appellant appeals against his conviction and sentence of a fine of Shs. 300/- or two months' imprisonment in default of payment thereof for failing to comply with the provisions of s. 15 (2) of the Maize Marketing Ordinance, Cap. 338. This offence is created by and punishable under sub-s. (3) of section 15 which reads as follows.

“Every maize producer who harvests maize and who unreasonably refuses or fails to comply with any of the requirements of sub-section (2) of this section shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings and to imprisonment for a term not exceeding one year.”

The appellant's brother was tried with him and convicted with him “for failing to comply with the provisions of s. 15 (2) of the law whilst the provisions of s. 20 had not been applied to such maize by the Board”.

Neither the appellant nor his brother was charged with an actual failure to comply with the provisions of s. 15 (2) which reads as follows:

“Every maize producer who harvests maize shall as soon as the maize is in a fit state for delivery, inform the Board or such agent as the Board may appoint for the purpose, of the quantity and location of the maize, and shall carry out such directions as to the delivery thereof, and the time and place of such delivery, as the Board or such agent shall convey to him.”

They were charged with “illegal possession of maize” contrary to s. 23 (1) of Chapter 338 of the Laws of Kenya and the particulars alleged that they illegally

took into their possession 15 bags of maize “knowing or having reasonable cause to suspect that it had not been dealt with in accordance with sub-s. (2) of s. 15 or as the case may be s. 20 of Chapter 338 and without the written authority of the Maize Marketing Board or its agents.” Thus they were charged with illegally taking the maize into their possession but were in effect convicted of being producers who had harvested maize and failed to comply with s. 15 (2) which would seem to be something different from what was alleged in the charge.

There is a good deal of uncertainty as to the full facts of the matter but it seems reasonably clear that the appellant’s brother was employed at all material times in Narasha forest and that the appellant had also once been employed in that forest up to about January or perhaps April, 1962 but that he had been discharged in January or April, 1962, and that he was not re-employed in that forest after that discharge. In the early hours of the morning of June 26, 1963 the appellant and his brother brought the maize in question on donkeys to the house of a man who lived at Muringwa about 100 yards outside the boundary of Narasha forest. The maize in question amounted to 15 bags of maize and it was being bagged for some sort of subsequent disposal at that house when the two accused were arrested later on June 26. It would also appear from the magistrate’s judgment that if the maize had been produced at Muringwa outside Narasha forest then it would not have been illegal to take it to the house where it was found for preparation for later disposal, but that if the maize had been taken there from Narasha forest such removal would have been unlawful. Certainly it was common case that if the maize had been produced in Narasha forest then it was not lawful to take it from the forest to the place at Muringwa where it was found, but that would clearly have been a different offence from the offence which was charged and also from the offence stated in the conviction, since there was no evidence that any directions had been given by the Board or its agent as to the delivery of this maize. The occupier of the house where the maize was found said that it had been brought from Narasha forest “because the accused had told me he wanted to move it and came from that direction”.

A police constable gave evidence to the effect that both the accused admitted to him that the maize had come from Narasha forest and that they had no permit in respect of it, but this statement would appear to be inadmissible under s. 25 of the Indian Evidence Act, 1872.

The appellant stated, in an unsworn statement, that he had produced the maize at Muringwa outside the forest. No enquiry appears to have been made as to whether the appellant or his brother had maize shambas either in the forest or outside it or as to whether maize appeared to have been recently harvested from any shamba cultivated by either of the accused. Certainly the evidence on the record falls far below the standard of proof ordinarily required for conviction in a criminal case, but the Ordinance contains a special provision regarding the burden of proof in s. 42 which reads as follows:

“The onus of proving the place of origin of maize or maize products the subject of any proceedings under this Ordinance shall lie upon the person prosecuted or claiming anything seized or detained under this Ordinance, and if in any such proceedings any question arises as to the lawfulness or otherwise of the possession of or any transaction in regard to maize or maize products, then the onus of proving the circumstances of such possession or transaction shall lie upon such person.”

In the course of his judgment the magistrate stated at page 2:

“Under section 42 the onus is upon the accused to satisfy the court that they were dealing legally and properly with the maize.”

and at page 3 he said:

“The onus lies on the accused to satisfy the court that all the circumstances of their transactions and possession were lawful.”

These directions overstate the extent of the onus imposed by s. 42 and constitute misdirections.

The accused had to prove the origin of the maize in so far as that was material and they had to prove the circumstances of their possession and transactions, but failure to do either of these does not constitute an offence per se.

The onus of proof of the origin of the maize was not discharged to the satisfaction of the court nor was the onus of proof as to the circumstances of the accused's possession discharged to the satisfaction of the court. These two failures justify the confiscation of the maize or at least its continued detention until the onuses are discharged, but they can hardly justify a finding, in the absence of evidence which could have been produced by the prosecution and was not produced, that s. 15 (2) had not been complied with so as to constitute an offence under s. 15 (3) nor, in our opinion, does failure per se to discharge these onuses justify conviction under s. 23 (1).

In view of the difference between the charge and the conviction and the misdirections as to the extent of the onus cast by s. 42 the conviction and sentence of the appellant cannot stand. They are set aside and the fine if paid must be refunded. In the exercise of our powers of revision we make similar orders in the case of the first accused who has not appealed. The order for confiscation of the maize will remain in effect.

*Appeal allowed. Conviction and sentence set aside. Order for confiscation of maize confirmed.*

The appellant did not appear and was not represented.

For the respondent:

*KC Brookes* (Deputy Public Prosecutor, Kenya)

*The Attorney General*, Kenya

**Ngige s/o Gatonye v R**  
**[1963] 1 EA 663 SCK)**

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 30 September 1963                    |
| <b>Case Number:</b>      | 784/1963                             |
| <b>Before:</b>           | Rudd and Wicks JJ                    |
| <b>Sourced by:</b>       | LawAfrica                            |

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[1] *Criminal law – Charge – Irregularity – Charge of contravening statute – Offence alleged a*

*contravention of order made under statute – Order contravened not specified in charge – Whether charge bad.*

*[2] Criminal law – Plea – Equivocal plea – Charge of contravening statute – Offence alleged a contravention of order made under statute – Admission by accused not an unequivocal plea of guilty to offence charged.*

### **Editor's Summary**

The appellant was charged with moving maize without a permit contrary to s. 24 of the Maize Marketing Ordinance (Cap. 338) and his plea was recorded as follows: "I moved it. I had no licence." The appellant was convicted on his plea and was sentenced to a fine of Shs. 99/- and confiscation of the maize was also ordered. On appeal it was common ground that the particulars as laid in the charge did not conform with s. 24 (2) of the Ordinance which refers to contravention of an order issued under s. 24 (1) of the Ordinance, whereas the particulars did not refer to any such order. On appeal,

**Held –**

- (i) the order for confiscation of the maize in addition to the fine of Shs. 99/- made the matter appealable as of right.
- (ii) the plea was not an unequivocal admission that maize was moved in contravention of an order made under s. 24 (1) of the Ordinance and accordingly the accused's plea was not an unequivocal admission of an offence against s. 24 (2) of the Maize Marketing Ordinance;
- (iii) the charge was bad because it did not specify that an order made under s. 24 (1) had been contravened and did not specify the Maize Marketing (Movement and Maize Products) Order that was alleged to have been contravened.

Appeal allowed.

**No cases referred to in judgment**

**Judgment**

**Rudd J:** read the following judgment of the court: In this case the appellant's application for leave to appeal was lodged some six days after the time for appealing had expired. He did not consult an advocate about the possibility of appealing until the day before his right of appeal expired and such delay might have told heavily against him but for the fact that he says that he was not informed of his right of appeal at the time the sentence was passed. The record tends to support this allegation in as much as it does not state that the appellant was informed of his right of appeal by the lower court. We allowed the appeal to be heard out of time.

The charge read as follows:

"Moving maize without a permit c/sec. 24 (2) Cap. 338 Laws of Kenya. *Particulars of Offence.* Ngige s/o Gatonye On April 16, 1963 at about 9.30 a.m. at Lesson in the Uasin Gishu District of the Rift Valley Province, you were found moving 8 bags of maize approx. 1,600 lbs. from Nabkoi Centre to Nandi Hills area without a permit authorising you to do so."

The appellant's plea was recorded as follows: "I moved it. I had no licence." The appellant was convicted on this charge and plea and was sentenced to a fine of Shs. 99/- and the maize in question was also ordered to be confiscated and handed over to the Maize Control Board. Had the case been dealt with by way of a fine of Shs. 99/- only without the order for confiscation there would have been no right of appeal, but we agree with Crown Counsel and counsel for the appellant that the order for confiscation in addition to the fine of Shs. 99/- clearly made the matter appealable as of right.

Turning to the appeal itself, reference to s. 24 (2) of the Maize Marketing Ordinance (Cap. 338) shows at once that the particulars as laid in the charge do not conform with the sub-section which refers to contravention of an order issued under sub-s. (1) of the section whereas the particulars do not refer to any such order. An accused person could not tell from the particulars what order was alleged to have been contravened or what defences might be available to him. There is little doubt in fact but that the prosecution hoped to establish a breach of the Maize Marketing (Movement of Maize and Maize Products) Order which was in fact made under s. 24 (1) of the Ordinance. But that was not stated explicitly in the charge and it should have been so stated in the charge.



This order provides specific exceptions to the general prohibition of the movement of maize which was created by para. 3 (1) of this Order. It was probably not necessary for the charge to traverse specifically all these exceptions it being enough to allege that the maize was moved in contravention of the order. If the accused person wished to rely on any of the exceptions it would have been for him to show that the exception might reasonably apply to the case. But

before an accused person can be convicted on his plea there must be an unequivocal admission that maize was moved in contravention of the order. The plea in this case did not contain such an admission.

In the result the appeal must be allowed for two reasons. First because the charge did not specify that an order made under s. 24 (1) had been contravened and did not specify the Order that was alleged to have been contravened and secondly, because the plea was not an unequivocal admission of an offence against s. 24 (2).

*Appeal allowed.*

For the appellant:

*CV Patel*

*Patel & Patel, Eldoret*

For the respondent:

*IE Omolo (Crown Counsel, Kenya)*

*The Attorney General, Kenya*

**Joseph M'Mboiria M'Rukwaro v R**  
[1963] 1 EA 665 (SCK)

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 30 September 1963                    |
| <b>Case Number:</b>      | 1149/1963                            |
| <b>Before:</b>           | Rudd and Wicks JJ                    |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Criminal law – Unlawful possession of livestock – Plea – Unlawful possession in proclaimed area of stock suspected of having been stolen – Equivocal admission by accused.*

**Editor's Summary**

The appellant was charged with unlawful possession in a proclaimed area of stock reasonably suspected of having been stolen. In his plea the appellant stated "It is true. I was in possession of this heifer and cow skin. This heifer was stolen". On this plea he was convicted as charged and in mitigation of sentence he stated: "I bought the cattle Kainjai. . . . I did not know it was stolen when I bought it." On appeal,

**Held –**

- (i) the appellant was entitled to be acquitted if he established affirmatively that he had bought the cattle in good faith with no knowledge or reason for belief or suspicion that they had been stolen or

unlawfully obtained;

(ii) the appellant's plea was not a unequivocal plea of guilty.

Appeal allowed. Conviction and sentence set aside. Retrial ordered.

**Case referred to:**

(1) *Chebusit A'Kalia v. R.*, [1963] E.A. 448 (K.).

**Judgment**

**Rudd J:** read the following judgment of the court: The appellant appealed from a conviction of being in unlawful possession in a proclaimed area of stock reasonably suspected of having been stolen. He was convicted on his plea which was recorded in the terms following:

"It is true. I was in possession of this heifer and cow skin. This heifer was stolen."

In mitigation he is recorded as having stated:

"I bought the cattle in Kainjai. I have no ticket to show this. I did not know it was stolen when I bought it."

In his petition of appeal he states:

“The stock that was found in my possession during my arrest had been bought by me from the market and I was sending them to the butchery at Kiberichia.”

Learned Crown Counsel felt unable to support the conviction since he did not consider that the plea was unequivocally a plea of guilty in as much that it did not unequivocally admit that the appellant had not come by the heifers and skin lawfully. He had in mind the possibility that the animals had been bought in market overt and if that were so the appellant would have been entitled to be acquitted. But even if the animals had not been obtained by sale and purchase in market overt we think that the appellant would have been entitled to be acquitted if he established affirmatively the fact that he had bought the cattle in good faith with no knowledge or reason for belief or suspicion that they had been stolen or unlawfully obtained.

This matter, *inter alia*, was considered by a court of three judges in *Chebusit A’Kalia v. R.* (1).

The issue as to the appellant’s guilt or innocence has never been decided. We set aside the conviction and sentence and order that the appellant be retried before another magistrate and that for that purpose he be produced as soon as possible before a resident magistrate.

*Appeal allowed.*

The appellant did not appear and was not represented.

For the respondent:

*VS Dhir* (Crown Counsel, Kenya)

*The Attorney General*, Kenya

## **Sydney Tate v Commissioner of Income Tax** [1963] 1 EA 666 (SCK)

|                          |                                      |
|--------------------------|--------------------------------------|
| <b>Division:</b>         | HM Supreme Court of Kenya at Nairobi |
| <b>Date of judgment:</b> | 29 July 1961                         |
| <b>Case Number:</b>      | 53 and 54/1959                       |
| <b>Before:</b>           | Mayers J                             |
| <b>Sourced by:</b>       | LawAfrica                            |

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*[1] Income tax – Profits – Purchase of coffee estate – Losses from cultivation of coffee – Subsequent user of land for other farming projects – Decision by owner to sell estate – Land sub-divided into plots – Roads and water installed – Plots sold at profit – Whether realization of investment or trading in land.*

**Editor’s Summary**

In 1943 the taxpayer purchased a coffee estate for £10,000. After several years of losses he began to change over to cattle and dairy farming and opened a quarry. From 1946 to 1951 he pursued on the land contemporaneously the cultivation of coffee, dairying and quarrying but in or about 1950 he decided to abandon coffee farming and thereafter was advised to dispose of his land to clear his substantial indebtedness to the bank. In 1946 the taxpayer had applied for permission to sub-divide his land but permission to sub-divide was not obtained until 1950, and he admitted that as early as 1946 he had decided to realize his land. The mode of realization adopted was to lay out the land in plots, instal roads and water and to advertize in the newspapers. Later a land agent was employed for part of the time on a salary and commission on the plots sold. Subsequent to the grant of permission to sub-divide, the taxpayer incurred expenditure of some £15,000 on preparing the land for sale, which was financed by loans from the bank which were debited in his accounts to a land realization suspense account. The Commissioner took the view that the taxpayer had traded in land and, therefore, that the profits from the sale of the land were liable to income tax and he issued assessments accordingly. The taxpayer

appealed and contended that he had not traded in land but was merely realizing his capital investment. The Commissioner submitted that the taxpayer had carried on a “business” within s. 81 (a) of the East African Income Tax (Management) Act, 1952 and that the business was that of notionally selling to himself agricultural land with a view to laying it out for building purposes and selling as building plots and that such notional sale must be deemed to have taken place by reason of the proportion borne to the original purchase price of the coffee estate by the expenditure incurred in laying out and disposing of the building plots.

**Held –**

- (i) the reasons which led the taxpayer to change his intention and dispose of the land were that he had acquired an asset which had ceased to be profitable and had to find funds to repay loans from his bankers: *West v. Phillips* (5) adopted.
- (ii) the circumstances of the instant case were indistinguishable from those in *Hudson’s Bay Co., Ltd. v. Stevens* (4) and the appeals must be allowed.

Appeal allowed.

[**Editorial Note:** An appeal from this decision to the Court of Appeal for Eastern Africa is reported at p. 671 of this volume.]

**Cases referred to in judgment:**

- (1) *Sharkey v. Wernher*, [1955] 3 All E.R. 493; 36 Tax Cas. 275.
- (2) *Commissioner of Income Tax v. A.V.*, 2 E.A.T.C. 387.
- (3) *Y. Co., Ltd. v. Commissioner of Income Tax*, 2 E.A.T.C. 50.
- (4) *Hudson’s Bay Co., Ltd. v. Stevens*, 5 Tax Cas. 424.
- (5) *West v. Phillips*, 38 Tax Cas. 203.

**Judgment**

**Mayers J:** These are appeals by a taxpayer against assessments to income tax in respect of money accruing to him from the sale as building plots of certain lands which prior to such sale were comprised in a parcel of land purchased by him some years before as a coffee estate.

The material facts, as culled from the evidence and answers in cross-examination of the appellant, which I accept without reservation, are hereinafter set out.

In 1943, the appellant, having disposed of his interest in an engineering concern, purchased a coffee estate for £10,000. In so doing, he was largely actuated by the fact that his son, who was then in the Army, showed a disinclination to return to engineering after the war and a great interest in farming.

From the time of the appellant’s acquisition of the coffee estate, coffee proved an unprofitable crop, and thereafter, after several years of losses, the appellant commenced to change over to cattle and dairy farming and opened a quarry. The change over from coffee to cattle and dairy farming was of necessity a gradual process as it required the clearing of the land by stages. From 1946 to 1951 there were conducted on the land contemporaneously the cultivation of coffee, dairying and the quarry. No profit at all was

made in 1947, 1948 and 1949. In 1950 there was a small profit. In or about 1950 the appellant decided to abandon coffee farming. Thereafter he was advised to dispose of his land to clear his very substantial indebtedness to the bank.

In cross-examination it emerged that the appellant applied for permission to sub-divide his land in 1946, although permission so to sub-divide was not obtained from the land control authority until 1950, and he admitted that as early as 1946 he had decided to realize his land.

The mode of realization adopted was to lay out the land in plots, instal roads and water and insert advertisements in the newspapers. Subsequently, a Mr. Hex, a land agent, was employed for part of the time at a monthly salary and on commission on plots sold. Great significance must not be attached to Hex's employment at a salary, as during the whole or at least a considerable part of the period when he was so employed the appellant was absent from Kenya, and Hex, who held the appellant's power of attorney, was not only concerned with the sale of plots, but also the general management of the appellant's landed interest. Subsequent to the obtaining of permission to sub-divide in 1950, the appellant incurred expenditure to the amount of some £15,000 on preparing the land for sale in the manner already specified. This expenditure was financed by loans from the bank which were debited in the appellant's accounts to a land realization suspense account.

On these facts the respondent assessed the taxpayer to income tax on the basis that at the time of the consent to sub-divide there had been a notional sale by the appellant to himself of the entire estate at the then market value of agricultural land – which, it may be observed, was substantially higher than at the time of the appellant's purchase of the estate, and that the difference between the assumed price of the land upon such notional sale together with the cost of preparing the land for sale as building plots and the price received from the sale of building plots represents a taxable profit.

The concept of a notional sale by anyone to himself of his own property is wholly at variance with the doctrine that no one can make a profit from himself. It must, however, now be regarded by virtue of the decision in *Sharkey v. Wernher* (1) as settled law that such notional sales can for the purposes of income tax be deemed to have taken place. The respondent's contention was that such notional sale must be deemed to have taken place by reason of the proportion borne to the original purchase price of the coffee estate by the expenditure incurred in laying out the building plots and by reason of the organization entailed in laying out those plots and in disposing of them, which, according to the respondent, afforded such indicia of trade as to be indicative of an intention to convert the land purchased as a coffee estate into a form of stock-in-trade.

The existence or otherwise of a notional sale is, in my view, of importance in the instant case only in relation to the determination of the amount, if any, of the "profit" in respect of which the appellant was liable to be assessed, not to what is the substantial question for decision, whether he was liable to be assessed in relation to his land transactions at all.

In essence, therefore, the present problem may be stated as being, did the appellant carry on the business of selling land during the relevant years, or was he merely realizing a capital asset to the best advantage? In this regard it should be observed that the word "business" is undoubtedly wider than the word "trade" which is used in the United Kingdom legislation, and also that, in view of the observations of Briggs, J.A., in *Commissioner of Income Tax v. A.V.* (2), the onus of proving that he did not carry on such a business rests upon the taxpayer.

Of the considerable number of decisions cited on either side there are three which I regard as having sufficiently close a bearing on this problem to enable the matter to be determined in the light of authority.

In *Y. Co., Ltd. v. Commissioner of Income Tax* (3), the facts as found by the learned judge were that a partnership was engaged in diverse activities, including the making of soap. With a view to separating the manufacture of soap from the other activities of the partnership, two companies were formed – the one to conduct the soap business and the other to conduct the other businesses. Subsequent to the formation of these companies, it was decided in 1946 to expand the existing soap factory, and therefore another plot of



land was acquired. This

plot of land was acquired by the partnership because the vendor was reluctant to sell to the company which was then carrying on the soap business. Some three years later plans were prepared for the building of a new soap factory on the newly acquired plot. Before building commenced, however, the company decided to discontinue the soap business and to sell its existing factory. Thereafter the partnership in whom the new plot was still vested transferred it to the company with a view to its being sold by the company. The company sub-divided the plot into eleven sub-plots which were sold separately. The revenue authorities sought to assess the profit derived from the sale of these eleven sub-plots to tax. Edmonds, J., however, held that such sale represented realization of a capital asset, not the carrying on of business.

In *Hudson's Bay Co., Ltd. v. Stevens* (5), the facts were that a company incorporated by Royal Charter was at the time of its incorporation granted extensive territorial rights over Rupert's Land. In 1869 the company surrendered these territorial rights in consideration, *inter alia*, of the company being granted from time to time title to twenty per cent. of all plots laid out for settlement in township areas on payment of a specified proportion of the costs of survey. Pursuant to this agreement, the company were in fact granted a large number of plots, and in due course commenced to sell them. One of the purposes to which the proceeds of such sale were authorized to be applied was the payment of dividends – a matter which in relation to a company incorporated with limited liability under the English Companies Act or under the local Companies Ordinance, would have infringed the rule that dividends cannot be paid out of capital unless the profits on such sales were to be treated as revenue transactions. On these facts it was sought to assess the company to income tax on the profits from the sales. In rejecting the contention that the profits were taxable, the learned Master of the Rolls said (5 Tax Cas., at p. 436):

“The real question is whether this money can be regarded as profits or gains derived by the company from carrying on a trade or business. In my opinion it cannot. The company are doing no more than an ordinary landowner does who is minded to sell from time to time as purchasers offer, portions suitable for building on an estate which has devolved upon him from his ancestors . . . This is not a case where land is from time to time purchased with a view to sale.”

So, too (*ibid.*, at p. 437), Farwell, L.J., said:

“Again a landowner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does this as owner, not as a land speculator. This company is not a company incorporated under the Companies Acts . . . for the purpose of dealing in land, but it is a corporation by Royal Charter and has therefore all the powers of an individual except so far as the charter expressly limits them. It would be different if a landowner, an individual, entered into the business of buying and developing and selling land; but the case of the owner whether of land, or pictures or jewellery selling his own property although he may have expended money on them in getting them up for sale is entirely different; he sells as owner, not as trader.”

The third case to which I propose to refer is *West v. Phillips* (5). In that case the material facts were that the appellant, a speculative builder, built over 2,000 houses (hereinafter referred to as Class A) with a view to letting them, and over 200 houses (hereinafter referred to as Class B) with a view to selling them when a favourable opportunity arose. The existence of rent control legislation and the increase in outgoings consequent upon war conditions having made the rental of the Class A houses unprofitable, he decided to sell them whenever they fell vacant or the sitting tenant offered to purchase. With this end in view, he

set up an estate agency. The Crown sought to assess him to income tax on the basis that the surplus of the sale of the Class A houses was profits either from the trade of speculative builder which he had wholly discontinued some years before, or from a new business as a dealer in property. Wynn-Parry, J., in rejecting the former of these contentions, said (38 Tax Cas., at pp. 212, 213):

“It comes to this: the house property had become more of a liability than a profit; he had to find moneys to clear his liabilities to his bankers, to the building societies and in respect of arrears of taxation . . . He did in fact sell Class A houses. If there had been no Class B houses, it is clear, pausing at that point, that the course which Mr. West followed was wholly consistent with his selling investments, with the result that any surplus on the sale would not be liable to tax.”

Subsequently the learned judge lays stress on the reason which led to Mr. West deciding to sell the Class A houses: that they had ceased to be profitable.

In seeking to apply the foregoing decisions to the instant case, it must be borne in mind that in the United Kingdom tax is exigible in relation to a trade. In this jurisdiction the relevant term is the wider term “business”. The “business” which the respondent alleges was carried on by the appellant is that of notionally selling to himself agricultural lands with a view to laying them out for building purposes, the laying out of the lands so notionally sold for building purposes and their subsequent re-sale as building plots. It seems to me that the essential features of any trade are the purchase of an asset with a view to its subsequent re-sale at a profit, either in the state in which it was purchased or after the doing to it of something to render it either more readily saleable or saleable to better advantage. In other words, the business alleged to have been carried on by the appellant bears all the hallmarks of a trade. From this it seems to me that the considerations which led to the decisions which I have above set out apply with full force to what the appellant is alleged to have done.

In argument it was contended for the respondent that as an agricultural estate was purchased the subsequent sale of portions of that estate after it had been cut up and adapted for sale as building plots constituted the sale of an asset other than that which had been purchased. There is undoubtedly considerable force in this argument which would suffice to distinguish this case from the *West* case (5), but it seems to me to be disposed of by the passages which I have already set out from the *Hudson Bay* case (4) and in particular by the observations of Farwell, L.J., in relation to the making of roads and the laying of sewers by a landowner with a view to sale of a portion of his land for building purposes.

I am wholly satisfied that the appellant’s intention when he bought the coffee estate was to operate an agricultural estate. In this view I am fortified by the evidence of Mr. Gill, a chartered accountant, that the accounts in relation to the sale of land were kept in a manner applicable to the disposal of an asset rather than to the carrying on of a business. Likewise, I am wholly satisfied that the reasons which led the appellant to change his intention in relation to the coffee estate were those which led Mr. West to change his intention in relation to the Class A houses which he had built with a view to letting; that is to say, that the original purpose for which he had acquired the asset had ceased to be profitable and that he was under the necessity of repaying indebtedness.

For these reasons I am wholly unable to distinguish the *Hudson Bay* case (4) from the instant case, and therefore these appeals must be allowed with costs.

*Appeal allowed.*

For the appellant:

*Gerald Harris and Sir William O'Brien Lindsay*  
*Hamilton Harrison and Mathews, Nairobi*

For the respondent:

*CD Newbold, QC and JC Summerfield* (Legal Secretary and Deputy Legal Secretary, East African  
Common Services Organization)  
*EA Common Services Organization*

## **Commissioner of Income Tax v Sydney Tate** **[1963] 1 EA 671 (CAN)**

**Division:** Court of Appeal at Nairobi  
**Date of judgment:** 20 October 1963  
**Case Number:** 19/1962  
**Before:** Sir Trevor Gould V-P, Crawshaw JA and Edmonds J  
**Sourced by:** LawAfrica  
**Appeal from:** H.M. Supreme Court of Kenya – Mayers, J

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*[1] Income tax – Sale of land – Profits – Purchase of coffee estate – Losses from cultivation of coffee – Subsequent user of land for other farming projects – Decision by owner to sell land – Land sub-divided into plots – Roads and water installed – Plots sold at profit – Whether realization of investment or trading in land.*

*[2] Income tax – Practice – Judicial decision as authority – Words in East African legislation different from British statute – Authority in East Africa of decisions in England upon similar legislation.*

*[3] Judgment – Judicial decision as authority – Income tax – Words in East African legislation different from British statute – Authority in East Africa of decisions in England upon similar legislation.*

### **Editor's Summary**

In 1943 the taxpayer purchased a coffee estate for £10,000. After several years of losses he began to change over to cattle and dairy farming and opened a quarry. From 1946 to 1951 he pursued on the land contemporaneously the cultivation of coffee, dairying and quarrying but in or about 1950 he decided to abandon coffee farming and thereafter was advised to dispose of his land to clear his substantial indebtedness to the bank. In 1946 the taxpayer had applied for permission to sub-divide his land but permission to sub-divide was not obtained until 1950, and he admitted that as early as 1946 he had decided to realize his land. The mode of realization adopted was to lay out the land in plots, instal roads and water and to advertize in the newspapers. Later a land agent was employed for part of the time on a salary and commission on the plots sold. Subsequent to the grant of permission to sub-divide, the taxpayer incurred expenditure of some £15,000 on preparing the land for sale, which was financed by loans from the bank which were debited in his accounts to a land realization suspense account. The

Commissioner took the view that the taxpayer had traded in land and, therefore, that the profits from the sale of the land were liable to income tax and he issued assessments accordingly. The taxpayer appealed and submitted that he had not traded in land but was merely realizing his capital investment. The Supreme Court upheld the taxpayer's contention and allowed his appeal against the assessment. The Commissioner then appealed and at the hearing did not contest that at the time of the purchase of the estate in 1943 the respondent's intention was to run the estate as a coffee plantation and that his purchase of it amounted to an investment of capital; but the Commissioner contended that as early as 1946 the taxpayer abandoned this intention and by virtue of the fiction of a notional sale by himself as investment holder to himself as a seller of or trader in land he became liable to tax on the profits from the sale of the land by sub-divisional plots. It was argued for the Commissioner that, despite the original intention of the taxpayer to make a capital investment, subsequent facts could lead to an inference of a change of activity and, therefore, of intention, and an adventure into business or trade, and that the test to determine whether the purported realization of a capital asset amounted in fact to a trade or business operation depended upon the method and circumstances of the development of the asset and its resale. The case for the Commissioner rested

primarily on an alleged change of intention by the taxpayer and, as a corollary, a notional sale by the taxpayer as an investor to himself as a trader, but it was also argued that in view of the word “business” in s. 8 (1) (a) of the local Act and its absence from the English Acts, the decisions in England should in East African cases be considered with caution.

**Held –**

- (i) although the word “business” in s. 8 (1) (a) of the East African Income Tax (Management) Act, 1952 widens the circle of activities embraced by the legislation as compared with the word “trade” in the United Kingdom legislation, the decisions of the courts of England have equal force and application to cases before the local courts, but each case must be judged on its own peculiar facts and circumstances and the principles laid down by authority for interpreting those facts and circumstances must be considered within the framework of the local Act;
- (ii) the proposition that when the taxpayer set about the development of his land with the purpose of disposal of it in sub-divisional lots, he brought about the fiction of a notional sale by himself as an investor to himself as a trader, was wholly unreal and could not be accepted. *Hudson’s Bay Co., Ltd. v. Stevens* (8), *Sharkey v. Wernher* (12) distinguished.
- (iii) the events leading up to the sub-division of the land, and the sale of it by sub-divisions, amounted to no more than the realization of a capital asset, and the profits therefrom were not liable to tax: *Z. Co., Ltd. v. Commissioner of Income Tax* (15) not followed.

Appeal dismissed.

[**Editorial Note:** A report of the decision from which this appeal was brought immediately precedes this report.]

**Cases referred to in judgment:**

- (1) *H. Co., Ltd. v. Commissioner of Income Tax*, 1 E.A.T.C. 65.
- (2) *Californian Copper Syndicate v. Harris*, 5 T.C. 159.
- (3) *Rand v. Albern Land Co., Ltd.*, 7 T.C. 629.
- (4) *St. Aubyn Estate, Ltd. v. Strick*, 17 T.C. 412.
- (5) *Commissioners of Inland Revenue v. Livingston*, 11 T.C. 538.
- (6) *West v. Phillips*, 38 T.C. 203.
- (7) *Cayzer Irvine & Co., Ltd. v. Commissioners of Inland Revenue*, 24 T.C. 491.
- (8) *Hudson’s Bay Co., Ltd. v. Stevens*, 5 T.C. 424.
- (9) *Tebrau (Johore) Rubber Syndicate, Ltd. v. Farmer*, 5 T.C. 658.
- (10) *Leeming v. Jones*, 15 T.C. 333.
- (11) *Thew v. South West Africa Co., Ltd.*, 9 T.C. 141.
- (12) *Sharkey v. Wernher*, [1955] 3 All E.R. 493; 36 Tax Cas. 275.
- (13) *Wellington Steam Ferries Co. v. Commissioner of Taxes* (1910), 29 N.Z.L.R. 1025.

(14) *Scottish Australian Mining Co., Ltd. v. Federal Commissioner of Taxation*, 4 A.L.T.R. 443.

(15) *Z. Co., Ltd. v. Commissioner of Income Tax*, 2 E.A.T.C. 57.

(16) *Y. Co., Ltd. v. Commissioner of Income Tax*, 2 E.A.T.C. 50.

October 28. The following judgments were read.

### **Judgment**

**Edmonds J:** In these appeals which were consolidated for hearing the Commissioner of Income Tax appeals from the judgment of the Supreme Court of Kenya which allowed appeals against an assessment to Income Tax

in respect of profit arising from the sale of certain land in the ownership of the respondent. It will be convenient to repeat the facts giving rise to the assessment which appear in the judgment of the learned judge of the court below and which he accepted. The relevant passage reads as follows:

“In 1943, the appellant (the respondent before this court), having disposed of his interest in an engineering concern, purchased a coffee estate for £10,000. In so doing, he was largely actuated by the fact that his son, who was then in the Army, showed a disinclination to return to engineering after the war and a great interest in farming.

From the time of the appellant's acquisition of the coffee estate, coffee proved an unprofitable crop, and thereafter, after several years of losses, the appellant commenced to change over to cattle and dairy farming and opened a quarry. The change over from coffee to cattle and dairy farming was of necessity a gradual process as it required the clearing of the land by stages. From 1946 to 1951 there were conducted on the land contemporaneously the cultivation of coffee, dairying and the quarry. No profit at all was made in 1947, 1948 and 1949. In 1950 there was a small profit. In or about 1950 the appellant decided to abandon coffee farming. Thereafter he was advised to dispose of his land to clear his very substantial indebtedness to the bank. In cross-examination it emerged that the appellant applied for permission to sub-divide his land in 1946 although permission so to sub-divide was not obtained from the land control authority until 1950, and he admitted that as early as 1946 he had decided to realize his land.

The mode of realization adopted was to lay out the land in plots, instal roads and water and insert advertisements in the newspapers. Subsequently a Mr. Hex, a land agent, was employed for part of the time at a monthly salary and on commission on plots sold . . . Subsequent to the obtaining of permission to sub-divide in 1950, the appellant incurred expenditure to the amount of some £15,000 on preparing the land for sale in the manner already specified. This expenditure was financed by loans from the bank which were debited in the appellant's accounts to a land realization suspense account.”

It is not contested by the Commissioner of Income Tax, the appellant before us, that at the time of the purchase of the estate in 1943 the respondent's intention was to operate the estate as a coffee farm and that his purchase of it amounted to an investment of capital. It is, however, the appellant's contention that as early as 1946 the respondent abandoned this intention and by virtue of the fiction of a notional sale by himself as investment holder to himself as a seller of or trader in land he became liable to tax on the profits from the sale of the land by sub-divisional plots. The sole issue in this appeal is, therefore, whether the profit on the sale of the land was income derived from a trade or business or whether it was capital appreciation. The learned judge in the court below put the matter thus:

“In essence, therefore, the present problem may be stated as being did the appellant carry on business of selling land during the relevant years, or was he merely realizing a capital asset to the best advantage in this regard. It should be observed that the word ‘business’ is undoubtedly wider than the word ‘trade’ which is used in the United Kingdom legislation . . .”

I think it is as well if at this stage the question of the implication of the word “business” in s. 8 (1) (a) of the East African Income Tax (Management) Act, 1952 is considered, for it was one of the early contentions for the appellant that in view of the presence of this word in the local Act and its absence in the English Acts, the decisions in England should be considered with caution in relation to



cases before the courts of East Africa. We were referred to the case of *H. Co., Ltd. v. Commissioner of Income Tax* (1) where the necessity for this caution was expressed, but in that case the court was faced with the position that there existed no definition of the word “trade” in the Kenya Income Tax Ordinance, Cap. 254. That Ordinance was, however, replaced by the Act of 1952, in which the word is defined in the same terms as in the Acts of England. It is nevertheless the fact that the word “business” is not included in the English Acts but is so included in the Act of 1952. Under this Act s. 8 (1) reads *inter alia* as follows:

“8(1) Tax shall, subject to the provisions of this Act, be charged in respect of each year of income at the rate imposed for that year by the appropriate Territorial Income Tax Ordinance upon the income of any person accruing in, derived from, or received . . .

in respect of –

(a) gains or profits from any trade, business, profession, or vocation, for whatever period of time such trade, business, profession, or vocation, may have been carried on or exercised.”

It is revealing to refer to para. 19 of the Second Schedule to the Act, as one finds these words appearing as the marginal note to the paragraph, namely, “Application to businesses, etc.”, the paragraph itself reading:

“19. The provisions of this Part of this Schedule shall, with any necessary adaptations, apply in relation to professions, employments and vocations as they apply in relation to trades.”

I think that as a result of this piece of legislation it would not be wrong to say that the word “business” was intended by the legislature to apply to and embrace occupations other than trade in the commercial sense. But I do not think that the meaning of the word “business” is intended to be limited by the legislature and I think that it would be true to say that people who are engaged in trade are commonly said to be engaged in business – although the contrary position may not be true. There is no definition of the word in the English or the local Act, yet it is revealing to note the indiscriminate use of the words “trade” and “business” in a number of English cases; see, for example, *Californian Copper Syndicate v. Harris* (2), *Rand v. Alburni Land Co., Ltd.* (3), and *St. Aubyn Estate, Ltd. v. Strick* (4). I think the anxiety which counsel for the appellant expresses is that, while the word “business” can embrace a single transaction, the word “trade” leaves the impression of only a plural or collective significance, and he was anxious to ensure that the respondent should not be held to be free of liability under the Act merely because of what might be thought a single venture in dealing with his land. I think that his anxiety is unfounded as an isolated venture or transaction in appropriate circumstances can be and has been held to be a trading venture – see, for example, *Commissioners of Inland Revenue v. Livingston* (5). While in Kenya the addition of the word “business” may have the effect of widening the circle of activities embraced by the legislation the tests to ascertain whether either a trade or a business has been exercised or carried on cannot be substantially dissimilar. I think, therefore, that the decisions of the courts of England have equal force and application to cases before the local courts. I do, however, agree with counsel for the appellant that each case must be judged on its own peculiar facts and circumstances and that the principles laid down by authority for interpreting those facts and circumstances must be considered within the framework of the local Act.

The principal contention for the appellant is that, despite an original intention of a taxpayer to indulge in a capital investment, subsequent facts can give rise to an inference of a change of activity and, therefore, of intention, and an adventure into business or trade. The case for the appellant rests primarily on a

change of intention, and, as a corollary, a notional sale by the respondent as an investor to himself as a trader. It is said for the appellant that the test to determine whether the purported realization of a capital asset amounts in fact to a trade or business operation depends upon the method and circumstances of the development of the asset and its resale. It is conceded that there is ample authority for the proposition that mere development and disposal of land by sub-divisional plots does not of itself make the operation a trade or business venture, but it is argued that the facts and circumstances in this case must lead inevitably to the conclusion that the respondent went beyond the mere act of appreciating his capital asset and that he indulged in trading in land. The facts which this court is asked to consider as clearly indicating a trading operation by the respondent are these; that the respondent's decision to sub-divide his land into residential plots was preceded by three business ventures which had failed, namely, the coffee venture, the dairy business and the quarry business, and that, hence, the sale of the land by sub-divisional plots was just another business venture conducted by the respondent in connection with his land; that at the time he sub-divided his land and sold certain of the plots, the respondent had no other occupation and that he, accordingly, was employing himself in a trade; that there was an element of risk or speculation by the respondent in developing his land by sub-dividing it, with all the expenses entailed thereby, and that had land values suddenly fallen he would have found himself in a disadvantageous business position; that the magnitude of the cost of the development (some £15,000, at a time when the land was valued at £30,000) bears no resemblance to improving a capital asset for the purpose of realization; that the obtaining of the money for this purpose by borrowing at interest suggests a business scheme; and that the employment of an agent to assist in the disposal of the plots is evidence of trading.

I do not quarrel with the contention that such factors are relevant to a consideration whether a person's activity amounts to trading, but each and all must be regarded in conjunction with such other indicia that may exist. As regards the employment by the respondent of an agent to assist in the disposal of the plots, it was held by Wynn-Parry, J., in *West v. Phillips* (6) (38 Tax Cas., at p. 213) that such a factor would not of itself be sufficient to change the original quality of an investment. The case of *Cayzer Irvine & Co., Ltd. v. Commissioners of Inland Revenue* (7) is authority for the principle that large development expenditure may be consistent with a trading venture. The facts in that case are set out briefly in the headnote of the report and are, so far as relevant, as follows:

"The appellant company (the main business of which was the management of a company owning a shipping line, though under its memorandum of association it had power to trade in land) purchased in 1915 a landed estate at a cost of £153,000. Between 1918 and 1929 the company sold certain small portions of the estate. From 1925 onwards, it granted to a building contractor options to build dwelling houses on parts of the estate, and between 1918 and 1937 it had granted over 1,100 feus to purchasers of such houses and to other private individuals. Between 1920 and 1937 it expended nearly £90,000 on development of the land (mainly on the construction of roads and sewers) of which it recovered some £24,000 from feus and local authorities. In order to finance the reconstruction of the shipping company, in which it held the majority of the ordinary shares, the company sold in the years 1935 to 1937 feu duties for £117,000 and undeveloped land for £84,000.

The company appealed against assessment to Income Tax under Case I of Schedule D, contending that the estate was acquired as an investment and that the sale of land and feu duties in 1935 to 1937 was merely the realisation of an investment to meet the company's financial necessities."

Lord Normand, Lord President of the Court of Session, is reported as having said this (24 Tax Cas., at p. 497):

“The large development expenditure appears to me to be on the whole consistent with the idea that the company was carrying on a trade in land rather than with the idea that it was throughout holding it as an investment only to be realized, if at all, when it desired to meet some financial need. Then in 1935 to 1937 when the company had financial difficulties it sold a large portion of the land for £84,600 and it realized feu duties for a sum of £117,000. Again, that fact was consistent with an investment held by the company and now realized because the day of financial need had arrived.

But the inference to be drawn from all the facts and from the absence of the evidence that ought to have been available if this had been an investment, was for the Commissioners. They, with their knowledge and experience of these matters, have come to the conclusion that the intention was to hold this estate not as an investment but as a trading asset and in order to develop it and to market it. There was evidence before the Commissioners which supported their finding, and it is, therefore, impossible for the court to give effect to the appeal by reversing the finding of the Commissioners.”

While the learned Lord President considered that the large development expenditure was consistent with trade, yet he considered the company’s ultimate realization of a large portion of land in order to overcome its financial difficulties was consistent with the realization of an investment. The Court of Session did not, however, interfere with the finding of the Commissioners for the time-honoured reason that an appellate court will not interfere in a finding of fact if there is evidence to support that finding. But the greater interest in that case, to my mind, is the opinion of Lord Normand that the disposal of a large portion of land, which had been developed at considerable expense, at a time of financial difficulty was more consistent with the realization of an investment. Those were the very circumstances which led the respondent in the case now before this court to develop his land and sell it by sub-division, in other words to sell it at the best possible price in order to meet the demands of his bank and to realize an asset that had been unprofitable over a number of years.

Before I leave the *Cayzer* case (7) I think it may be found instructive for the purpose of considering the present case if I quote the following further extract from Lord Normand’s opinion (*ibid.*, at p. 496). He said:

“There may well be a difference between three general types of case. There is the case where an individual, who has either inherited or has acquired land, deals with it much as this company dealt with the estate of Ralston, and in such a case it might well be that it would be easier to find that the proprietor was holding the estate as an investment rather than holding it as something with which to trade and which he was developing with a view to realization in the market. Again, there is the case where a company is formed to trade in land and is found to be dealing with its land much as this company has been found to be dealing with its land. In such a case I think it might be comparatively easy to hold that it was dealing with the land as a trader, since the company itself was formed for that very purpose. But this is a case intermediate between those two, for the appellants were a company incorporated to acquire and carry on the business of shipowners, ship managers and insurance brokers, and their main business was that of managers of the Clan Line Steamers, Ltd. Therefore it cannot be said that they were a company the main purpose of which was to carry on dealing in land. On the other hand, they were a company which was formed for the purpose of earning a trading profit and their activities, one might suppose, were mainly directed to that end. They had power under the objects clause of

the memorandum of association to trade in land. That is not disputed; and accordingly if they did trade in land they were acting intra vires and the profits of that part of their business would be just part of the normal and contemplated trading profits of the company. Moreover, a company formed to carry on in the main a particular line of business may often and does often carry on a subordinate business or trade the profits of which are a part of the profits of the company as a whole.”

It seems to me that the respondent in the case before this court falls within the first type of case described by the Lord President.

A further factor in the method adopted by the respondent which, it is said, evidences his turn from activity as an investor to that of a trader is the change of character he introduced to the subject matter of his investment, that is to say, in sub-dividing his land and selling it by sub-divisions rather than as a whole. The case of *Commissioners of Inland Revenue v. Livingston* (5) referred to such a factor as being some evidence of the taxpayer indulging in trade. That was a case where the taxpayer purchased a ship with the intention of re-selling at a profit after carrying out extensive repairs and alterations, and it was held that, though the venture was isolated, such was the activity of the taxpayer in converting it with the intention of re-sale that the business was in the nature of trade. The Lord President of the Court of Session said (11 Tax Cas., at p. 543):

“The profit made by the venture arose, not from the mere appreciation of the capital value of an isolated purchase for resale, but from the expenditure on the subject purchased of money laid out upon it for the purpose of making it marketable at a profit. That seems to me of the very essence of trade.”

It is to be noted that the Lord President there stresses two things, namely, the expenditure on the ship, and such expenditure being for the purpose of re-sale. Lord Sands in his opinion (*ibid.*, at p. 543) said:

“I do not think that merely putting the article in question in a suitable condition for favourable sale would necessarily have this effect, as, for example, having a picture cleaned, or a ship’s boilers cleaned and the hull repainted. But I am disposed to think that it would introduce the element of carrying on a trade if the purchaser were, by himself or his own employees or by a contractor, to carry through a manufacturing process which changed the character of the article. An illustration might be the purchasing of a quantity of pig iron and having it manufactured into steel, or of gold-bearing ore and having the gold extracted by milling the ore.”

If it can be said, which I doubt, that, by sub-dividing, the respondent in this appeal changed the character of the land, the subject matter of his investment, the fact remains that he did not purchase the land with that intention or of reselling at a profit. To this extent the present case may be distinguished from the *Livingston* case (5), in which the court was mainly concerned with the question whether an isolated transaction of purchase and sale could be “in the nature of trade”. Had the ship in question been owned and employed by the respondents in (say) a shipping business over a period and improved and converted for the purpose of sale only when no longer useful to that business I do not doubt that the case would have been decided differently.

Counsel for the respondent relied on *Hudson’s Bay Co., Ltd. v. Stevens* (8) and this was the case which influenced the learned judge of the court below to allow the appeal by the respondent. It is also the case which counsel for the appellant sought strenuously to distinguish from the facts in the case now before us. He contends that the decision in the *Hudson’s Bay Co.* case (8) depended on

its own peculiar facts, that the Court of Appeal was dealing with a more limited concept of trade and that the facts in that case bear no resemblance to those in the present case. It is further contended that the passage in the judgment of Farwell, L.J., on which the learned judge in the court below relied, was obiter. The *Hudson's Bay Co.* case (8) is very well known but it is necessary, I think, to set out the facts in some detail in order that an intelligent appreciation of the opinions expressed by the learned members of the Court of Appeal may be had. I think the material facts are sufficiently set out in the judgment of the Master of the Rolls (5 Tax Cas., at p. 435) as follows:

“The question in this appeal is whether Income Tax is payable in respect of a sum of £177,000 received by the company in the year 1903 from the sale of land. It is necessary to consider the precise position of the company. It was created by Royal Charter in 1670. By the Charter King Charles granted an enormous tract of land in the north-west of Canada with very important trading rights. A chartered company is essentially different from a statutory company, and, speaking generally, it occupies a position similar to that of an individual; it can do anything that it is not prohibited from doing. The Charter contains no provision as to profits, and I think it is clear that the familiar doctrines as to the distinction between capital and income and the powers of the directors in paying dividends had no application to the company. In 1867 the Dominion of Canada was founded. The Hudson Bay territory was not originally included, but provision was made for admitting it. In 1869, in pursuance of Parliamentary powers the company surrendered to the Crown all their rights and territories within Rupert's Land, with certain exceptions not material to be mentioned, and all their rights of Government, but they retained their trading rights, and the Crown subsequently declared that Rupert's Land should be admitted within the Dominion of Canada.

The consideration for the surrender was twofold. In the first place the sum of £300,000 cash which was paid by the Canadian Government, and next a right at any time within fifty years to claim in any township or district within the fertile belt in which land should be set out for settlements grants of land not exceeding one-twentieth part of the land so set out, and the blocks so granted to be determined by lot, and the company to pay a rateable share of the survey expenses. Under this provision the company have from time to time obtained from the Canadian Government various grants, and they have from time to time sold portions of the land thus granted to persons willing to buy, and the sum now in question represents the net amount derived from the sale of the land in the year in question. The company proposed to apply the money, and I presume have applied it, together with other money, in reducing the capital of the company by £2 a share . . .”

The learned Master of the Rolls then said:

“The real question is whether this money can be regarded as profits or gains derived by the company from carrying on a trade or business. In my opinion it cannot. The company are doing no more than an ordinary landowner does who is minded to sell from time to time, as purchasers offer, portions suitable for building of an estate which has devolved upon him from his ancestors.”

Farwell, L.J., said (*ibid.*, at pp. 437, 438):

“Again, a landowner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does this as owner, not as a land speculator. This company is not a company incorporated under the Companies' Acts or the Companies' Clauses Act for the purpose of dealing in

land, but it is a Corporation by Royal Charter and has, therefore, all the powers of an individual except so far as the Charter expressly limits them. It would be different if a landowner, an individual, entered into the business of buying and developing and selling land; but the case of the owner, whether of land, or pictures, or jewels, selling his own property, although he may have expended money on them in getting them up for sale, is entirely different; he sells as owner, not as trader.”

Obiter though that opinion may be, it is an opinion which has been followed and accepted in subsequent cases, notably *Tebrau (Johore) Rubber Syndicate, Ltd. v. Farmer* (9) and *Leeming v. Jones* (10).

For the appellant the case of *Californian Copper Syndicate v. Harris* (2) is relied upon, particularly the following passage appearing in the judgment of the Lord Justice-Clerk (5 Tax Cas., at p. 165):

“It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for Income Tax.”

Those principles have, of course, been accepted over and over again, but the point taken for the appellant in the present case is in relation to the words used by the learned Lord Justice-Clerk “a realization or change of investment” and it was argued that those words connote a sale in the same form as the asset was acquired. I am unable to agree, however, that there is any implication in the passage quoted that an improvement or modification of the form of the asset before sale necessarily deprives the asset of its capital nature. In the *Californian Copper Syndicate* case (2), Lord Trayner expressed himself (5 Tax Cas., at p. 167) as satisfied that the company:

“was formed in order to acquire certain mineral fields or workings – not to work the same themselves for the benefit of the company, but solely with the view and purpose of reselling the same at a profit.”

In most of the cases on which the appellant relies the fact emerges that the taxpayer had acquired the asset with the intention of reselling it at a profit, and there can be no quarrel with a finding in such circumstances that the venture was in the nature of a trade and that the profit therefrom became liable to tax. In *Thew v. South West Africa Co., Ltd.* (11), Rowlatt, J. said (9 Tax Cas., at p. 156):

“For the present purpose, that is to say, for the purpose of ascertaining whether profits made upon a sale of an article are taxable profits, I think it is sufficiently accurate to say that it depends upon whether the article was acquired for the purposes of trade or not.”

He then went on to distinguish the facts in that case from those in the *Hudson’s Bay Co.* case (8) and found that the company “with a purely commercial object,



acquired the whole thing with a view to make profits out of it.” The three judges in the Court of Appeal all agreed with the judgment of Rowlatt, J.

I do not propose to consider in this judgment all the cases cited to this court for the appellant. Each was decided on its own peculiar facts and in the majority it was found that the original purpose of the acquisition of the asset was for the purposes of resale by way of trade. But it is urged for the appellant that if the facts of a case warrant the inference, it can be held that, even if the original purpose was to acquire an investment, there occurred a change of intention and a determination to utilize the asset in trade. I accept this, but, of course, the question arises whether the facts in the case before this court justify such a finding. In this respect counsel invited this court to draw an analogy between the facts now before this court and those in *Sharkey v. Wernher* (12). The facts and the respective contentions of the parties in this case may be taken from the judgment of Vaisey, J., in the Chancery Division (36 Tax Cas., at p. 279):

“Lady Zia carries on the activities of a stud farm on certain premises at Newmarket, and those activities, that is to say the whole of such activities, are admitted, for the purposes of the present appeal, to be ‘farming’ activities, which by virtue of s. 10 of the Finance Act, 1941, and s. 31 (1) (a) of the Finance Act, 1948, are to be treated as the carrying on of a trade of which the profits are charged to tax under Case I of Schedule D. She also carries on separately other activities, namely, those of racing and training horses; such activities are neither farming nor any other kind of trading but are purely recreational in character, not giving rise to any liability to tax.

Lady Zia breeds horses at her stud farms for her racing stables, and from time to time transfers, or moves, horses from the farms to the stables. In the relevant year five horses were so transferred or moved by her. In the stud farm accounts the cost of breeding these horses had been debited, and the question is what sum in respect of the five horses ought, consequent upon such transfer or move, to be brought into such accounts as a receipt or credit.

The respondent says that the proper figure to be so brought into the accounts was the cost of breeding the transferred horses, the same figure appearing on both sides of the accounts, or, alternatively, omitted altogether. The Crown, on the other hand, contends that it should be the market value of the animals, namely, the price which they would have fetched on an assumed or notional sale, such value being considerably more than the cost of breeding them.”

This case finally reached the House of Lords on appeal and, while the proposition that a person cannot trade with himself was acknowledged, it was appreciated that in the particular circumstances of the case, where the taxpayer’s wife was operating in different capacities, the proposition could be qualified and it could be held that in transferring horses from her farming activities to her recreational activities she was notionally trading with herself. This was not in contest between the taxpayer and the Inspector of Taxes. The only contest was the figure at which the transaction should be brought into the accounts. I cannot see that there is any similarity between the facts in that case and those in the present case. Indeed, I think they are incomparable. Yet it is the contention for the appellant that the case is authority for a notional sale in the circumstances of the present case and that it should be held that when the respondent set about the development of his land with the purpose of disposing of it in sub-divisional lots, he brought about the fiction of a notional sale by himself as an investor to himself as a trader. I cannot accept this. The proposition is wholly unreal. It is perhaps significant that counsel for the appellant has been unable to draw the court’s attention to any case in which the fiction of a notional sale has been used other

than in the very special circumstances of *Sharkey v. Wernher* (12). The contention for the appellant goes against the very foundation of the *Hudson's Bay Co.* case (8) and the other cases which have followed it, and I have no doubt that the House of Lords would be bewildered to learn that such an interpretation is suggested as being justifiable upon their opinions in that case. I agree with the view expressed by the learned judge in his judgment in the court below in the present case as to the purpose and practical application of the fiction of a notional sale. He said:

“The existence or otherwise of a notional sale is, in my view, of importance in the instant case only in relation to the determination of the amount, if any, of the ‘profit’ in respect of which the appellant was liable to be assessed, not to what is the substantial question for decision, whether he was liable to be assessed in relation to his land transactions at all.”

I think nobody doubts that it is possible for the owner of a capital asset consisting of land, to decide to utilize it in a business of dealing in land; that is the reverse of what happened in *Sharkey v. Wernher* (12) and whether the principle there laid down could assist in ascertaining the value at which the land should be assessed (as being in the nature of opening stock) is not a matter with which this court is concerned in the present case. What is not possible, in my opinion, is to call in aid *Sharkey v. Wernher* (12) to support a proposition that a mere decision to realize a capital asset to the best advantage necessarily imports, or is of itself even evidence of, any such decision or notional sale.

Two other cases have been drawn to our attention in support of the appeal and I must briefly deal with each. *Wellington Steam Ferries Co. v. Commissioner of Taxes* (13), concerned the activities of a company which was formed with the primary object of taking over the business of a ferry and recreation-ground proprietor. It carried on this business for a number of years and subsequently sub-divided its surplus lands and sold the sub-divisions. Its memorandum of association gave it power *inter alia* to deal in land. The following passage appears from the judgment of Cooper, J. (29 N.Z.L.R., at p. 1036):

“In 1905 it commenced to sub-divide some of the land purchased by it from Mr. Williams. No doubt up to that time it had used this land in connection with its ferry business, but I have come to the conclusion that the sub-division of this land was the commencement by the company of the land business which it was authorized by its memorandum of association to embark in. It expended a large sum of money in roading and sub-dividing the land into allotments for the purposes of sale. In that month it sold 54 separate allotments to 27 different people. Then it transferred its ferry business to another company, taking as payment the greater proportion of shares in the new company. From this time it ceased to carry on business as a ferry company, but it continued its accommodation-house and recreation-grounds, and to sell its lands. I am unable to come to the conclusion that it was merely realizing its investments in land.”

The *Hudson's Bay Co.* case (8) was not considered by the learned judge, and it would appear that his decision was largely influenced by the fact that the company's articles made provision for it to buy and sell land. Such a factor is not present in the case before this court and on that ground alone it can be distinguished from that case, but in any event I doubt the soundness of the view taken in that case. It was doubted in *Scottish Australian Mining Co., Ltd. v. Federal Commissioner of Taxation* (14). And, as I have referred to this case, I think it instructive to include the following quotation from the judgment of Williams, J. (4 A.I.T.R., at p. 450):



“The facts would, in my opinion, have to be very strong indeed before a court could be induced to hold that a company which had not purchased or otherwise acquired land for the purpose of profit-making by sale was engaged in the business of selling land and not merely realizing it when all that the company had done was to take the necessary steps to realize the land to the best advantage, especially land which had been acquired and used for a different purpose which it was no longer businesslike to carry out.”

That is a view which has my full support and seems to fit exactly the circumstances in the case now before this court.

A further case to which attention is invited by the appellant is that of *Z. Co., Ltd. v. Commissioner of Income Tax* (15). The facts of the case appear sufficiently from the headnote and are as follows:

“In 1949 the appellant company was incorporated in order to take over from a syndicate an estate which had, shortly before the formation of the appellant company, been acquired by the syndicate. Prior to the acquisition by the syndicate of the estate it had been operated as a coffee estate. The appellant company had power to deal in, develop and lay out land for building purposes. The appellant company sub-divided and sold a considerable portion of the estate, the remainder being retained and worked as a coffee estate. The appellant company claimed that it had acquired the estate with the sole intention of working it as a coffee estate and that it was only subsequently that it was decided to sub-divide and sell part of the estate.”

De Lestang, J., said (2 E.A.T.C., at p. 62):

“The question for decision in this appeal is whether the sale of the plots constituted a trade or business. In order to decide this question, the purpose for which the land was purchased is very relevant because if one of the objects of the appellant company was to sub-divide and sell part of the land, then there can be no doubt that any profits made by such sales would be liable to tax.”

He then proceeded to consider the evidence and found as a fact that it was the company’s original intention at the time it acquired the land to develop and sell portions which were not suitable for coffee growing. There then appears the following passage in his judgment:

“This finding is sufficient to dispose of this appeal. Mr. Newbold, however, further contended that even if the original intention of the company was to run the estate solely as a coffee farm, the subsequent change of intention, namely to sub-divide and sell two-thirds of the estate, had the effect of changing the nature of the holding, so that it became, as to those two-thirds, stock in trade, the profits from which are liable to tax.”

In dealing with this aspect of the case the learned judge considered and sought to distinguish the *Tebräu* case (9) and the *Hudson’s Bay Co.* case (8) in these words:

“*Tebräu’s* case (9) is distinguishable from the present case on a number of essentials. For example, to quote only two of them; firstly, in *Tebräu’s* case (9) the estates were sold as a whole; in the present case a scheme of sub-division was put into effect. Secondly, in *Tebräu’s* case (9) the transaction involved the winding-up of the company; here there was no winding-up and in point of fact the company retained about one-third of the estate. For these reasons, in my view, *Tebräu’s* case (9) has no application to the facts of the present case.

In the *Hudson's Bay Co.* case (8) a chartered company which had received lands in exchange for the surrender of its territorial rights was held not taxable on the profits of the sale of such lands, although they might be applied in payment of dividends. That case is also distinguishable from the present case on several points. The *Hudson's Bay Co.* case (8) concerned a charter company which is in the same position as an individual, whereas the appellant company is a company incorporated under the Companies Ordinance for the purpose of trading. A similar distinction was made by Harman, J., in 35 Tax Cas., at p. 250. Again, the Hudson's Bay Company did not do what the appellant company did in the present case and the facts of both cases are quite different."

The learned judge then considered the *Californian Copper Syndicate* case (2) and the dicta of the Lord Justice-Clerk, which I have already quoted, and it was after repeating those dicta that he said this:

"Applying these principles to the present case and assuming that the original intention of the appellant company was to run the estate as a coffee farm only, I would still find that the subsequent sub-division and sale of part of the farm in plots was an operation of trade and business for profit-making rendering the company liable to tax of any profits made."

That conclusion was, of course, obiter and, with great respect to the learned judge, I do not think that the authorities which I have considered in this judgment support the decision, which I think was largely coloured by the existence in the articles of association of the company of a power to deal in land. Nor do I think that the grounds on which he distinguished *Tebräu's* case (9) and the *Hudson's Bay Co.* case (8) were valid. However, there are two distinguishing features between the *Z. Co., Ltd.* case (15) and the present case and they are that the former concerned a company having express power to deal in, develop and lay out land for building purposes; and in the present case the respondent decided to sell his land because of financial difficulties which was not the reason for the company's action in the *Z. Co., Ltd.* case (15).

In *Y. Co., Ltd. v. Commissioner of Income Tax* (16), which was decided a little earlier in the same year though not apparently considered in the *Z. Co., Ltd.* case (15), the court held on facts not so very dissimilar from those in the *Z. Co., Ltd.* case (15) that the profits arising from the sale of land which had been developed and sub-divided arose from the realization of a capital asset and not from trade. The decisions in the two cases are opposing. The *Y. Co.* case (16) may be said to follow the principles which I have endeavoured to show as emanating from the *Hudson's Bay Co.* case (8) and those other cases I have considered.

The historical antecedents leading up to the sub-division of this land and the sale of the plots by the respondent establishes that he invested the capital proceeds of the sale of his interest in an engineering business in a coffee estate; that he purchased the estate with the intention of operating it as a coffee farm; that on this activity proving unprofitable he ventured into a dairy business and then a quarry; that on these proving equally unsuccessful and on being pressed by his bank, the respondent decided to wind up his business adventures and to realize his capital asset in the form of the land to the best advantage – namely, by sub-dividing the land and selling it by sub-divisions. This action, in my opinion, amounted to no more than the realization of a capital asset, and the profits therefrom are not liable to tax.

In coming to my conclusions on this appeal, I have not found it necessary to deal with the cross appeal in which the respondent has raised the question as to where the onus lies in proving that the profits sought to be taxed constituted

income derived from a trade or business. It is not therefore necessary for me to express any opinion on the question.

In my opinion, the appeal should be dismissed with costs. I would certify for two counsel.

**Sir Trevor Gould V-P:** I have had the advantage of reading the judgment of Edmonds, J. I entirely agree with it and have nothing to add.

The appeal is dismissed with costs (certified for two counsel).

**Crawshaw JA:** I also agree.

*Appeal dismissed.*

For the appellant:

*PJ Treadwell* (Asst. Legal Secretary, East African Common Services Organization)

*The Legal Secretary, E. A. Common Services Organization*

For the respondent:

*Gerald Harris and HN Armstrong*

*Hamilton Harrison & Mathews, Nairobi*

## **Musa NSW Kitonto v The Kabaka's Government** [1963] 1 EA 684 (HCB)

|                          |                                  |
|--------------------------|----------------------------------|
| <b>Division:</b>         | High Court of Buganda at Kampala |
| <b>Date of judgment:</b> | 11 December 1963                 |
| <b>Case Number:</b>      | 378/1963                         |
| <b>Before:</b>           | Slade J                          |
| <b>Sourced by:</b>       | LawAfrica                        |

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[1] *Jurisdiction – Buganda courts – Suit filed in High Court – Action for damages for negligence of employee – Vicarious liability of employer – Application to transfer suit to Principal Court – Meaning of “customary law prevailing in Buganda on or after the commencement of this Ordinance” – Buganda Courts Ordinance, s. 10 (b) (Cap. 77) (U.).*

### **Editor's Summary**

The plaintiff filed a suit in the High Court against the defendant claiming general and special damages arising from the negligence of a civil servant in the exercise of his professional duties. The defendant applied for transfer of the suit to the Principal Court under s. 7 of the Buganda Courts Ordinance. For the defendant it was submitted that since the tort of negligence was known to Buganda customary law, the

Principal Court had jurisdiction by virtue of s. 10 (b) of the Ordinance to entertain the suit; and that the language of s. 10 (b) is such as to envisage the assimilation into customary law of common law principles and that those principles had been so assimilated.

**Held –**

- (i) the words “customary law prevailing in Buganda on or after the commencement of this Ordinance” in s. 10 (b) of the Buganda Courts Ordinance mean that the Buganda Courts have jurisdiction to administer and enforce customary law which had effect in Buganda at the date of commencement of the Ordinance which continues to have validity at any material time subsequent to that date and which has not ceased for any reason to have validity, such as replacement by written law or obsolescence in modern conditions;
- (ii) by claiming to have adopted into customary law the principles of the common law it cannot be said that the Buganda courts can confer upon themselves jurisdiction which by virtue of s. 9 (c) of the Ordinance they would otherwise not possess;
- (iii) the onus is upon the applicant to show that the Principal Court will not be required to administer and enforce the common law and, unless the High Court is satisfied on that, it cannot be satisfied that the court to which transfer is

sought has jurisdiction; as the court was not so satisfied the application should be dismissed.

Application dismissed.

### Cases referred to in judgment:

- (1) *Wamala v. Sebutemba and Others*, [1963] E.A. 631 (U.).
- (2) *Musanje v. Yamulemye*, [1961] E.A. 761 (C.A.).

### Judgment

**Slade J:** This is an application made under s. 7 of the Buganda Courts Ordinance (Cap. 77) by the defendant for a transfer of the suit filed in this court to the Principal Court.

The plaint filed is a claim against the Kabaka's Government for general and special damages arising from the negligence of a civil servant, apparently a dentist, in the service of that Government in the exercise of his professional duties.

Counsel for the applicant argued that the tort of negligence being known to Buganda customary law, the Principal Court has jurisdiction by virtue of s. 10 (b) of the Buganda Courts Ordinance to entertain the suit and that therefore it is mandatory to order the transfer of the proceedings to that court.

The question of transfer under s. 7 of a common law action was very recently before this court in the case of *Wamala v. Sebutemba and Others* (1) in which I endeavoured to distinguish the case of *Musanje v. Yamulemye* (2) so far as the latter case related to the common law, and counsel for the applicant, with his customary courtesy, argued that my decision in *Wamala's* case (1) was wrong and that the position is now essentially the same as it was before the revocation of s. 20 of the Uganda Order in Council, 1902. To hold otherwise, he said, would be largely to deprive the Principal Court of its statutory jurisdiction. Counsel for the applicant, if I am not doing violence to his argument, went on to say that although matters such as professional negligence, vicarious liability for the acts of servants and the like may not have been known to Buganda custom at the time when the Buganda Courts Ordinance had been enacted, the language of para. (b) of s. 10 is such as to envisage the assimilation into customary law of common law principles, that those principles had been so assimilated and that therefore the Principal Court had jurisdiction, it being unnecessary to invoke the principles of common law as such.

The effect of this submission on the interpretation of s. 10 (b) is therefore that new custom, previously unknown and which may indeed be foreign to the previous concepts of customary law, can be established after the date of the commencement of the Buganda Courts Ordinance. With respect to counsel for the applicant I am unable to accept that proposition. It does not seem to me that the words "customary law prevailing in Buganda on or after the commencement of this Ordinance" have the positive effect claimed for them: the paragraph in question, in my opinion, means that the Buganda Courts have jurisdiction to administer and enforce customary law which had effect in Buganda at the date of the commencement of the Ordinance which continues to have validity at any material time subsequent to that date and which has not ceased to have validity by reason of, for example, replacement by written law, or by being regarded as obsolete and so no longer applicable in modern conditions. In other words, I do not think that by claiming to have adopted into customary law the principles of the common law the Buganda Courts can confer upon themselves jurisdiction which by virtue of s. 9 (c) of the Ordinance they would

otherwise not possess. To take the contrary view, in my opinion, would mean

that the Buganda Courts can render inoperative the denial of jurisdiction contained in s. 9 of the Ordinance.

As to the submission that the effect of the decision in *Wamala's* case (1) is to deprive the Principal Court of its jurisdiction or of a substantial part of it, I do not agree that it has that effect. The Principal Court has by statute the jurisdiction conferred upon it by s. 10 of the Buganda Courts Ordinance and nothing said in *Wamala's* case (1) deprives it of any part of that jurisdiction. At the same time under s. 9 of the Ordinance the Principal Court is expressed to have no jurisdiction in any of the proceedings therein set forth. *Wamala's* case (1) in no way extends the ambit of that section.

For the reasons I stated in *Wamala's* case (1) the onus is upon the applicant to show that the court will not be required to administer and enforce the common law. Unless this court is satisfied on that matter it cannot be satisfied that the court to which transfer is sought has jurisdiction.

I am not so satisfied, and in consequence the application is dismissed with costs to the plaintiff.

*Application dismissed.*

For the applicant-defendant

*Walter Jayawardena*

*Buganda Government, Uganda*

For the respondent-plaintiff:

*SH Dalal*

*Dalal & Singh, Kampala*

**Aloysious Byaruhanga v The Rukurato**  
[1963] 1 EA 686 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 29 November 1963                |
| <b>Case Number:</b>      | 414/1963                        |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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[1] *Criminal law – Trial – Nullity – Summons served in respect of one charge – Appearance by accused – Accused then charged and tried on other charges – Accused informed of other charges before trial – Plea taken – No request for adjournment – Whether trial a nullity.*

[2] *Criminal law – Practice – Record of trial – Trial before African District Court – Proceedings recorded in English and not in Lutoto – Irregularity.*

**Editor's Summary**

The appellant was summoned to attend a district court to answer a charge of stealing government money. When he appeared for his trial, the court tried and convicted him on eight other counts alleging theft of an aggregate of Shs. 225/- of which counts, he alleged, he had no prior notice but to which when charged he had pleaded not guilty. He was sentenced to imprisonment and ordered to refund Shs. 112/50 to the complainants. On appeal against conviction and sentence his counsel argued that the trial was a nullity because the appellant had been tried on eight counts as to which there was no complaint and because s. 4A of the African Courts (Amendment) Ordinance, 1962 had not been observed in that the presiding judge did not sum up the evidence to the assessors nor require them to state their opinions. The appellant also complained that the presiding judge persistently refused despite the appellant's protests to record the evidence in Lutoto and failed to record other objections made by the appellant as to the evidence.

**Held –**

- (i) when the appellant appeared, albeit on a different charge, it was only necessary for the court to inform him of the real charges against him, which



it had done; if the appellant was misled in any way it was for him to complain to the court and ask for an adjournment if he wished; no injustice had been occasioned and the appellant had participated to the full in the whole trial;

- (ii) the appellant understood and appreciated the proceedings and there was nothing in the record to indicate that the appellant had protested at any time against the record being kept in the English language; the maintenance of the record of the court was entirely a matter for the presiding judge and it was not open to the appellant to say in what language the proceedings of the court should be recorded;
- (iii) on the face of the charge there was no misjoinder and the charge was properly drawn up and the appellant was in no way thereby embarrassed;
- (iv) it was clearly the duty of the presiding judge at the close of the whole evidence to sum up such evidence to the assessors sitting with him during the trial, and thereafter to ascertain and record in writing the opinion of each of the assessors on the evidence; the presiding judge could only deliver his judgment after having heard and recorded the opinion on such assessors;
- (v) while it was statutorily obligatory that s. 4A (2) (d) of the African Courts (Amendment) Ordinance, 1962 should be observed, the mere failure to record the summing up and the opinion expressed on the evidence was not conclusive that the evidence was not summed up to the assessors or that the assessors did not express their individual opinions on such evidence;
- (vi) no miscarriage of justice had been occasioned by the omission to comply with s. 4A and the court would not be justified in declaring the proceedings a nullity by reason only of the omission to record that the evidence was summed up to the assessors and the opinion of the assessors expressed on such evidence;
- (vii) the appellant's case would have been stronger if there had been some evidence to show that the presiding judge did not agree with the opinion of the assessors, and had failed in his judgment to indicate why he had differed from the opinions of such assessors.

Appeal dismissed. Order for refund to the complainant varied and increased to Shs. 225/ – .

## **No cases referred to in judgment**

## **Judgment**

**Udo Udoma CJ:** This is an appeal against the judgment of the District African Court of Toro sitting at Fort Portal. The appellant was charged with, tried and convicted on eight counts of stealing various sums of money. He was sentenced to one month's imprisonment on each count to run consecutively and ordered to refund Shs. 112/50 to the true owners. He now appeals to this court against his conviction and sentence.

The grounds of appeal are as hereunder set forth:

1. The present criminal proceedings against the appellant were not instituted in the manner prescribed by r. 5 of the African Courts Rules, 1959 (Legal Notice 274 of 1959).
2. The summons issued against the appellant in compliance with which he appeared in the court below on June 18, 1963 refers to Criminal Case No. 40 of 1962 and the charge levelled against him relates to an

offence alleged to have been committed contrary to s. 257 of the Penal Code, which Ordinance the Central Kabarole Court has no power to administer.

3. The appellant, who was summoned to appear before the District African Court on June 18, 1963 did not have reasonable information as to the nature of the offence with which he was charged or that the summons

did not contain a statement of offence with which the appellant was charged, nor did it contain any particulars as required by the said r. 5 (6) of the African Courts Rules, 1959.

4. The appellant failed to get a fair trial by reason of the following facts:
  - (i) all the proceedings in the court below were recorded by the presiding judge in English, the language which is neither familiar to the presiding judge nor to the assessors nor to the appellant;
  - (ii) joinder of several counts embarrassed the appellant in his defence.
5. The appellant was hampered and gravely prejudiced in his defence on account of:
  - (a) the persistent refusal by the court below to record the evidence in Lutoto;
  - (b) the persistent refusal by the presiding judge to record the objection of the appellant as to the method of recording the evidence and as to the admissibility of certain questions and answers.
6. The court below did not permit the appellant to call his witness by name Andrae Mabale and refused to hear his evidence even though he was summoned as a witness by the appellant and even though he was available in the court below throughout the trial. Had the court below heard the evidence of this witness it might have come to a different conclusion as to the guilt of the appellant.
7. There was no compliance with the provisions of s. 4A of the African Courts (Amendment) Ordinance, 1962 in that the presiding judge did not sum up any evidence to the assessors nor did he require the assessors to state any opinion. Consequently the decision of the court below is not a decision under r. 24 of the African Courts Rules, 1959, and is in any case in violation of sub-s. (2) (d), (e) of the said s. 4A of the African Courts (Amendment) Ordinance, 1962.
8. The conviction of the appellant on count 6 is bad in law and in fact in that Yohana Isingoma (P.W. 6) was not called as a witness nor did he give evidence.
9. There is no evidence on the record to show that the appellant committed any of the offences on April 10, 1962 or on April 16, 1962 or on any other date.
10. There is no evidence on the record to show that the sums alleged to have been stolen by the appellant belonged to or were the property of the persons named in the counts.
11. The judgment of the court below contains serious misdirections and non-directions as enumerated herein below:
  - (a) The presiding judge misdirected himself in holding that only two facts were necessary to be proved in order to establish the guilt of the appellant, namely:
    - (A) "the receipt of the said money by the accused as a Gomborora Chief responsible for all cash paid to his office", and
    - (B) "the method by which the securities were paid back to the owner".
  - (b) The presiding judge misdirected himself in holding that it was for the appellant to disprove his guilt by calling witnesses.
  - (c) The presiding judge misdirected himself in holding that the act of putting the signatures by the appellant on the entries could amount to criminal intention to steal money.

- (d) The presiding judge did not direct himself at all upon the elementary ingredients which are necessary to be present to prove the offence of theft.
12. The presiding judge failed to appreciate the significance of the thumb marks against the relevant entries in the record book and the signatures of the appellant thereon.
  13. The presiding judge failed to appreciate the difference between criminal intention to steal and the negligence in carrying out duties of the office.
  14. In any case, the sentence and the order for refund of money are harsh and excessive.

The case of the prosecution in support of the charge against the appellant was quite simple and straightforward. It was that on or about April 7, 1962 Filipo Zagiza (P.W. 1), Fabiano Nzigu (P.W. 2), Sipiriyano Katimbiri (P.W. 3), Frederick Birubiza (P.W. 4) and Soverio Muhenga (P.W. 8) (hereinafter referred to as complainants) were arrested for having committed a breach of health bye-laws. They were taken to the Gomborora H.Q. of which the appellant was the Gomborora Chief in charge. They were there detained for about two days. Thereafter the appellant told them that if they wanted to be released on bail they should each pay the sum of Shs. 25/- by way of security deposit for that purpose. All the complainants immediately paid Shs. 25/- each to the appellant, whose duty it was to receive the money.

On receiving the money, the appellant asked each of the complainants to sign his court record book, Exhibit A, showing that they had each paid that sum to him, which they did by making their thumb marks thereon. The appellant accordingly released all of them on bail and informed them that they need not bother to come for their cases unless they were summoned to do so. The appellant did not issue them with any receipt for their deposits.

Similarly on April 8, 1962 Benezeri Tinkasimire (P.W. 7) (hereinafter called complainant) and his brother Yohand Isingoma were arrested for fighting in public and were brought to the appellant at the Gomborora H.Q. and there detained. The appellant on April 10, 1962 received from each of them the sum of Shs. 25/- as deposit for bail, but again issued them with no receipt for the money. He released them on bail and as usual advised them not to bother to report to the court until summoned to do so. On or about April 9, 1962 Ntwirenabo (P.W. 5) (hereinafter referred to as complainant) was arrested and taken to the Gomborora H.Q. He was there detained. On or about April 10, 1962 he paid Shs. 50/- by way of security deposit to the appellant, who thereupon released him on bail. He was not to report to the court until summoned.

After the appellant had released the complainants on bail, he showed to his cashier, Ezironi Kasaija (P.W. 9) the court record book (Exhibit A) containing the names of the complainants with the amount paid by each recorded against each name and told him that he would let him have the money the following day. The following day, however, very early in the morning the appellant travelled to Kamwenge Saza H.Q. but without giving the money to the cashier. Two days later he returned but still did not hand over any money to the cashier.

When no summonses were forthcoming, the complainants reported at the Gomborora H.Q., and on enquiry about their cases, the appellant assured them not to worry and that they would be duly notified when their cases would be heard. Each time each of the complainants reported at the Gomborora H.Q. the appellant usually took them and spoke to them outside his office.

When later the cashier suggested that official receipts ought to be issued for the various sums of money which had been collected from the complainants by way

of security deposits, the appellant told him that Government receipts were not necessary as he did not intend to prosecute the complainants. Two months thereafter the appellant was suspended from duty, and on enquiry by the cashier (P.W. 9), the appellant assured him that he had already refunded the deposits to the complainants through his Mukungu Chief (P.W. 10), but that he had forgotten to obtain the signature of the depositors by way of receipts in the court record book (Exhibit A), as he had paid out the various sums to the complainants in a hurry. He then instructed the cashier (P.W. 9) to affix his thumb print in the court record book (Exhibit A) against each of the names of the complainants, which the latter did, in the belief and on the assurance by the appellant that he was speaking the truth and should be trusted. The appellant also countersigned the book as witness to the thumb impressions and as the person who had refunded the money to the depositors. Thus the thumb impression of the cashier (P.W. 9) was obtained in the court record book (Exhibit A) under the pretext that it was the thumb impression of each of the complainants, the said thumb impression being witnessed by the appellant.

On July 9, 1962 when investigations started as to whether or not the appellant did collect the various sums alleged and, if so, whether he had refunded the same to the complainants, the appellant approached the Mukungu Chief (P.W. 10) and requested him to agree that the various sums had been truly refunded to two, at least, of the complainants through him. The latter refused to accede to this request. Thereupon after enquiries the appellant was arrested and charged.

In his defence the appellant admitted having received the various sums by way of security deposits from the complainants, having entered the various sums in the Government court record book (Exhibit A), and having there and then obtained the signatures or marks of the various depositors. He admitted also having signed the said record book as an indication that he had collected the various sums. His defence was that he had later paid over the money and handed over the court record book (Exhibit A), to the Gomborora cashier (P.W. 9) in the presence of the court clerk and that the money was embezzled by the latter. In proof of this defence he drew the court's attention to the thumb marks of the cashier against each of the names of the complainants as evidence that the cashier had perpetrated a fraud and that his (i.e., the appellant's) signature in the book (Exhibit A) was fraudulently obtained by the latter who had tricked him into signing the same. He maintained that he had appended his signature in the book (Exhibit A), on the false representation of the cashier (P.W. 9) that he, the cashier (P.W. 9) had already refunded the money to the complainants.

The appellant also admitted that Yohana Isingoma and Benezere Tinkasimira (P.W. 7) had each paid Shs. 25/-, but that on his instructions the money was paid to the cashier (P.W. 9). He contended that his arrest was the result of a plot by the cashier and the Saza Chief.

Thus the question for determination by the court was not whether the various sums had in fact been paid. Of that there was no dispute. But whether the appellant did pay over the various sums to the cashier, which was the defence of the appellant, and as to whether it was the cashier, again as alleged by the appellant, who had received the sums paid by Tinkasimira (P.W. 7) and Isingoma. These were pure questions of fact for the court. It was open to the court to accept the defence of the appellant or the case of the prosecution that it was the appellant who had collected all the money and had failed to refund the same to the various depositors. The court accepted the prosecution case. I am unable to say that the court was wrong in so doing. The court, quite properly, I think, rejected the defence as on the facts the evidence against the accused was over-whelming.

Holding as I do that the court was justified in its decision on the evidence as to the issues of facts, I am of opinion that there is no substance in grounds 9, 10,

11, 12 and 13 of the grounds of appeal, which I consider as dealing mainly with the evidence that was before the court.

But as the whole of the trial has been questioned on grounds of law, I now turn to consider the issues of law which have been raised in the grounds of appeal. I propose to consider grounds 1, 2 and 3 of the grounds of appeal together as they appear to relate to the same or similar issues affecting the procedure and practice followed by the court at the trial.

It has been submitted by counsel for the appellant that the procedure adopted by the court in instituting the proceedings against the appellant was irregular and that that irregularity affected the merits of the case. As I understand it, it is said that the appellant was summoned in respect of a case No. 40 of 1962 on a charge of stealing Government money contrary to s. 257 of the Penal Code, and that when he appeared for his trial in answer to that summons he was instead tried for other offences comprising eight counts. The contention is that this was irregular and not in accordance with r. 5 (1) of the African Courts Rules, 1959, since there was no complaint in regard to the eight counts for which the appellant could be tried in terms of r. 5 (2) and (3) of the African Courts Rules, and that the trial was therefore a nullity. It has been submitted further that since the summons relates to a charge under the Penal Code which the court had no jurisdiction to try, the summons could not be said to relate to the subsequent charges against the appellant for which he was tried and convicted. In the circumstances, it has been submitted that the appellant did not have reasonable information as to the subsequent charges against him.

For the respondent, counsel submitted that there was no irregularity in that, the appellant having appeared before the court, it was competent for the court to have tried him. He had pleaded to the charge when read and explained to him. He was therefore fully informed of the charges against him. He was in no way prejudiced as the charge against him for which he was tried was based not on the Penal Code, but on customary law, to which the appellant is subject.

The provisions of r. 5 (1), (2) and (3) of the African Courts Rules are as follows:

5. (1) Cases of a criminal nature may be instituted either by the making of a complaint or the bringing before the President of a Court of a person who has been arrested without a warrant.
- (2) Any person who has reasonable cause to believe that an offence has been or is being committed by any person may make complaint to the President of any Court having jurisdiction.
- (3) A complaint may be made orally or in writing and if made orally shall be reduced to writing by the President of the Court.

Now the submission of the counsel for the appellant is not that there was no complaint as such but that the complaint against the appellant concerned Case No. 40 of 1962, for which a summons was issued to him, and not of the case ultimately tried by the court. On a consideration of the circumstances of this case I am satisfied that there is no substance in this complaint.

The appellant was albeit brought before the court by the authority of the summons under the hand of the President of the court in terms apparently of r. 5 (6) of the African Courts Rules, as a result of a complaint made to him in that regard.

The appellant having appeared, it was only necessary, in my view, for the court to inform him of the real charges against him, which it did. If the appellant was misled in any way it was for him to have complained to the court and to have asked for an adjournment, if he wished. The appellant did neither complain nor ask for an adjournment. Instead on the new charges being read and explained

to him, he pleaded in terms amounting to “not guilty” thereto, which showed that he not only understood but fully appreciated the charges against him as being based on customary law.

The issue of a summons directed to a person against whom there is a complaint is only a means of bringing that person before the court. Once the person appears, it is competent for the court, if the complaint on the summons was in error, to inform the person of the real charges against him, thereby enabling him to plead thereto; and that I find was what had happened in this case. No injustice, in my view, has been occasioned thereby as the appellant participated to the full in the whole of the trial, which lasted for about five days, cross-examined witnesses vigorously and made a somewhat spirited, if daring, defence, which was rejected by the court. In my view, grounds 1, 2 and 3 of the grounds of appeal must therefore fail.

There is also no substance in grounds 4, 5 and 6 of the grounds of appeal as I am satisfied that the appellant understood and appreciated the proceedings of the court. There is nothing in the record indicating that the appellant protested at any time against the record of the court being maintained in the English language as the proceedings were conducted in the local language and the appellant participated fully in the said proceedings. The maintenance of the record of the court is entirely a matter for the presiding judge. It is not open to the appellant to say in what language the proceedings of the court should be recorded. No attempt was made to indicate to this court what inadmissible questions and answers were recorded in the court proceedings. On the face of the charge against the appellant I hold that there was no misjoinder. I am satisfied that the charge was properly drawn up and that in no way was the appellant embarrassed thereby.

On the face of the record, the accuracy of which is not in any way challenged in this appeal, at the close of the case for the prosecution the appellant had indicated to the court that he proposed to give evidence on oath and to call two witnesses only. Accordingly, he testified on oath and also called two witnesses, whose evidence was incidentally, not of much assistance to him. In its judgment, the court had to remark with some surprise that the appellant did not call more witnesses to refute the evidence of two, at least, of the prosecution witnesses, who had testified before the court; this goes to show that the court would have been most willing to have listened to any more witnesses, if the appellant had sought to call them, and that the appellant did not at any time express any desire to the court to call more witnesses.

I now come to ground 7, which raises an important point of law in regard to procedure. It has been submitted that the court failed to comply with the provisions of s. 4A (2) (d) and (e) of the African Courts (Amendment) Ordinance, 1962 in that the presiding judge did not sum up to the assessors nor did he record the opinion of the assessors in the record of proceedings. In his submission, counsel for the appellant contended that the failure to record the summing up of the evidence to the assessors and also to record the opinion of the assessors was such an incurable defect as to nullify the whole of the trial.

For the respondent it was contended that by inference from the provisions of s. 4A (2) (a) and (b) it was competent for the presiding judge to proceed to judgment in the case without recording his summing up to the assessors and regardless of the absence or presence of the assessors.

The provisions of s. 4A of the African Courts (Amendment) Ordinance, 1962, which are relevant to this appeal are as follows:

- 4A. (1) . . .
- (2) In any proceeding tried with the aid of assessors: –



- (a) if at any time before the findings any assessor is from any sufficient cause prevented from attending throughout the proceedings or absents himself and it is not practicable immediately to enforce his attendance the hearing shall proceed with the aid of the other assessor;
- (b) if at any time before stating their opinion both assessors are prevented from attending or absent themselves the proceedings shall be continued without assessors;
- (c) . . .
- (d) when the case for both sides has been closed the person presiding shall sum up all the evidence and shall then require each of the assessors separately to state his opinion orally and shall record such opinion.
- (e) the person presiding shall then pronounce judgment but in doing so shall not be bound to conform to the opinions of the assessors;

Provided that where the person presiding does not conform to the opinion of any assessor he shall record the reason for not conforming to such opinion.”

From the above provision, it is clearly the duty of the presiding judge at the close of the evidence of both the prosecution and the defence to sum up such evidence to the assessors sitting with him during the trial, and thereafter to ascertain and record in writing the opinion of each of the assessors on the evidence. The presiding judge would only deliver his judgment after having heard and recorded the opinion of such assessors. In the instant case, there is nothing on the record to show that this procedure was followed. The opinions of the assessors were nowhere recorded nor is there any indication on the record that the evidence was summed up to them. It would appear therefore that s. 4A (2) (a) of the African Courts Ordinance was not complied with.

Now the question is, what is the effect of such non-compliance with the section? Is such non-compliance sufficient to render the whole of the trial a nullity? I think not. For while it is statutorily obligatory that the provisions of s. 4A (2) (d) of the African Courts (Amendment) Ordinance, 1962 should be complied with, it seems to me that the mere failure to record the summing up and the opinion expressed on the evidence is not conclusive that the evidence was not summed up to the assessors or that the assessors did not express their individual opinions on such evidence. The case of the appellant would have been stronger if, for instance, there was some evidence to show that the presiding judge did not agree with the opinion of the assessors, and had failed in his judgment to indicate why he had differed from the opinions of such assessors.

I am, however, aware of the affidavit filed by the appellant in this appeal, to which the court’s attention was drawn. But I place no reliance on it whatsoever. In any case, a copy of the affidavit was never served on the presiding judge to afford him the opportunity of refuting or confirming the allegation therein contained. A copy of the affidavit ought to have been served by counsel for the appellant on the presiding judge as the affidavit, I find, contains a scurrilous attack on the presiding judge. It is not clear why this court should act upon such an *ex parte* affidavit, which was drawn to the court’s attention only at the hearing of this appeal. There was no application to this court for the use of such an affidavit, nor did the grounds of appeal allude to such an affidavit having been filed by the appellant.

However that may be, I am satisfied that no miscarriage of justice has been occasioned by the omission to comply with the provisions of s. 4A (2) (d) of the African Courts (Amendment) Ordinance, 1962, and on the basis of substantial justice, I am of opinion that this court will not be justified in declaring the



proceedings in the case a nullity by reason only of the omission to record that the evidence was summed up to the assessors and the opinion of the assessors expressed on such evidence. I think this is a case in which the provisions of s. 34 of the African Courts Ordinance ought to apply as the defect was in my view merely a defect in procedure and a mere matter of technicality.

It was also contended under ground 8 of the grounds of appeal that the conviction on count 6 was bad in law and in fact in that Yohand Isingoma, the owner of the sum expressed to have been stolen in that count, was not called as a witness, he not having given evidence. This ground must also fail because the submission overlooked the fact that Benezeri Tinkasimire (P.W. 7) gave evidence to the effect that he and his brother Yohand Isingoma, were arrested by the appellant for fighting in a public place and kept in custody for eight and nine days respectively, and that it was only after they had each paid Shs. 25/- to the appellant that they were released on bail pending the hearing of their case, which was never heard. In the course of his defence the appellant in his evidence in chief also admitted ordering them to pay Shs. 25/- each in order to be released on bail and that they were subsequently released on bail by him. Surely that was sufficient evidence upon which the court was entitled to act as it did. The offence in count 6 is therefore clearly established on the evidence.

It is however difficult to support the order of the presiding judge for a refund by the appellant of only Shs. 112/50 to the true owners. The total amount as appearing on the various counts and supported by the evidence before the court as having been stolen by the appellant was the sum of Shs. 225/-. The order by the presiding judge for a refund of only Shs. 112/50 appears to be arbitrary in the extreme. It is not clear how this sum would be shared among all the complainants. I would therefore set aside the order for a refund of Shs. 112/50 and substitute therefor an order that the sum of Shs. 225/- be refunded to the true owners. Accordingly I order that the sum of Shs. 225/- be refunded to the complainants including Yohand Isingoma according to the amount which was deposited by each of them. Subject to that amendment I would dismiss this appeal. The appeal is accordingly dismissed. Court below to carry out this order.

*Appeal dismissed. Order for refund to the complainant varied and increased to Shs. 225/-*

For the appellant:

*VN Ponda*

*Shaukat Virji, Daphtary & Co, Kampala*

For the respondent:

*AK Korde (State Attorney, Uganda)*

*The Attorney General, Uganda*

**Durga Dass Bawa v Commissioner of Income Tax**  
[1963] 1 EA 695 (CAN)

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 20 November 1963

**Case Number:** 32/1961

**Before:** Sir Ronald Sinclair P, Sir Trevor Gould V-P and Crawshaw JA  
**Sourced by:** LawAfrica  
**Appeal from:** High Court of Uganda – Sheridan, J

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*[1] Income tax – Income – Ex gratia payment – Appointment of agent terminated after many years service – Ex gratia payment of £5,000 – Personal gift by principals offered by letter – Payment made after termination of employment – Payment in appreciation of long and loyal service – Whether taxable as gains or profits from employment or services rendered.*

### **Editor's Summary**

In 1948 the appellant was appointed distributor in the Tororo area for a tobacco company. His appointment was subject to termination by three months' notice in writing by either side. From 1928 to 1948 he had served the company and its predecessor as agent for the same area. In 1949 a private limited company under the name of D. D. Bawa, Ltd. was incorporated, which thereafter with the consent of the company operated the agency. By letter dated March 16, 1957 the company informed the appellant that for business reasons it was obliged to terminate his appointment as distributor from June 17, 1957 and gave him three months' notice of the termination of the appointment. The letter also stated that the company had decided "as a mark of our appreciation for the long and loyal service you personally have rendered to this company, to grant you a personal gift on an ex gratia basis . . . "and without admitting any legal liability offered the appellant Shs. 100,000/- payable by four equal instalments on September 17 and December 17, 1957 and on March 17 and June 17, 1958. The appellant accepted the payments which were assessed as income liable to tax under the East African Income Tax (Management) Acts, 1952 and 1958. The only issue was whether this gift was taxable. The High Court, in dismissing the appellant's appeal, held, *inter alia*, that although personal esteem for the appellant may have played some part, there was not sufficient evidence to show that a preponderant personal regard for him had inspired the gift, that the payments had something to do with his employment, that while the letter was personal and the gift was described as ex gratia, it was a formal letter and the offer was "sandwiched" between other paragraphs dealing exclusively with business and the wording was not appropriate to a personal gift or testimonial, but rather to the offer of a payment in the nature of remuneration for past services. On further appeal, it was submitted for the appellant that the payments were made after the termination of the legal relationship and therefore the principles applied by the High Court were not appropriate and that undue weight had been given to certain factors which were immaterial.

### **Held –**

- (i) a payment is not taxable merely because it had "something to do" with one's employment, if "the occasion of making it arises out of his past services"; dictum of Rowlatt, J. in *Cowan v. Seymour* (3) adopted.
- (ii) while the taxability of a gift is not conclusively determined by the way an employer describes it, there could be no doubt about the intent conveyed by the wording of the letter in the present case;
- (iii) there was no significance in the fact that the letter was written before the actual termination of the appellant's employment;

- (iv) too little weight had been attached to the factors that the gift was made after termination of the employment, that it was not recurrent, and was not made pursuant to legal obligation, or any custom or legitimate expectation on the part of the appellant arising from the nature of his employment;
- (v) the payment was a personal gift made after termination of employment and was not taxable as gains or profits from employment or services rendered.

Appeal allowed.

### Cases referred to in judgment:

- (1) *Herbert v. McQuade*, 4 Tax Cas. 489.
- (2) *Cooper v. Blakiston*, 5 Tax Cas. 347.
- (3) *Cowan v. Seymour*, 7 Tax Cas. 372.
- (4) *Reed v. Seymour*, 11 Tax Cas. 625.
- (5) *Moorhouse v. Dooland*, [1955] 1 All E.R. 93; 36 Tax Cas. 1.
- (6) *Wright v. Boyce*, [1958] 2 All E.R. 703; 38 Tax Cas. 160.
- (7) *Calvert v. Wainwright*, 27 Tax Cas. 475.
- (8) *Denny v. Reed*, 18 Tax Cas. 254.
- (9) *Davis v. Harrison*, 11 Tax Cas. 707.
- (10) *Weston v. Hearn*, [1943] 2 K.B. 421; 25 Tax Cas. 425.
- (11) *Stedeford v. Beloe*, 16 Tax Cas. 505.
- (12) *Beynon v. Thorpe*, 14 Tax Cas. 1.
- (13) *Henley v. Murray*, [1950] 1 All E.R. 908; 31 Tax Cas. 351.

November 20. The following judgments were read:

### Judgment

**Sir Trevor Gould V-P:** This is an appeal from a judgment and decree of the High Court of Uganda at Kampala dismissing consolidated appeals against assessments to income tax in respect of sums totalling £5,000 paid to the appellant by the East African Tobacco Co., Ltd. as to £2,500 in 1957 and the balance in 1958.

In 1928 the appellant became the agent of the British-American Tobacco Co., Ltd. in Tororo, and in 1948 the last mentioned company was succeeded by the East African Tobacco Co., Ltd. The appellant was offered and accepted the post of distributor in the Tororo area for that company in 1948, an engagement subject to termination by three months' notice in writing from either side. On January 6, 1949, a private limited company under the name of D. D. Bawa, Ltd. was incorporated and it thereafter operated the agency with the consent of the company.

On March 16, 1957, the East African Tobacco Co., Ltd. wrote to the appellant the following letter:

*“Registered Post*

*Private and Personal*

16th March, 1957.

D. D. Bawa, Esq.,

P.O. Box 16,

Tororo, Uganda.

Dear Sir,

It is with much regret that we have to advise that consequent upon our wish to re-organize our distribution in the Tororo Region and the completion of our Depot at Tororo we must terminate your appointment as our Distributor as from June 17, 1957.

Under the terms of your Agreement with us dated May 15, 1948, you are entitled to three months' notice of the termination of this appointment and this letter serves to confirm the verbal notice which was given to you today.

We are most sorry to have to make this change and having to break the happy association which we have had with you over so many years. We have decided, as a mark of our appreciation for the long and loyal service you personally have rendered to this Company, to grant you a personal gift on an ex-gratia basis and without admitting any legal liability for doing so, the payment of the sum of Shs. 100,000/- which will be paid to you in quarterly instalments as follows:

- (a) September 17, Shs. 25,000/-  
1957
- (b) December 17, Shs. 25,000/-  
1957
- (c) March 17, 1958 Shs. 25,000/-
- (d) June 17, 1958 Shs. 25,000/-.

In addition we will be prepared to consider taking over the following: stacking board, stationery and transport which you may have acquired in connection with our business at an agreed valuation.

It is understood that until the Distributor Agreement terminates as indicated above on June 17, 1957, the terms thereof as contained in our letter dated May 15, 1948, will continue to apply.

We shall be grateful if you will acknowledge the receipt of this letter and the acceptance of the terms contained therein by returning to us the enclosed copy duly signed where indicated.

Yours faithfully,

East African Tobacco Company Limited  
(signed) P. J. Rogers  
Chairman."

A few additional facts are briefly stated in the judgment under appeal as follows:

"It will be seen that this letter terminated the agreement as from June 17, 1957, in accordance with the 1948 agreement. In September, 1957, the appellant was paid the first instalment, by cheque, by representatives of the company at a large social function which was held at Tororo. He was also presented with a silver salver. The cheque was credited to D. D. Bawa, Ltd. in the first instance. Mr. Sohanlal Bawa (P.W. 1), the appellant's son said that this was a mistake but he conceded that this came to light when the Income Tax authorities sought to tax D. D. Bawa, Ltd. on it. I accept it that the company held the appellant in esteem as a result of their business association for many years, but on the meagre evidence available I am unable to say what was the degree of that esteem."

The appellant was assessed to tax in respect of the first two instalments under the provisions of the East African Income Tax (Management) Act, 1952, s. 8 (1) (b) and in respect of the last two instalments under the 1958 Act. There are some differences in the wording of the two enactments but they have not been relied upon as being material, and I will set out only s. 8 (1) (b) of the 1952 Act:

"8(1) Tax shall, subject to the provisions of this Act, be charged in respect of each year of income at the rate imposed for that year by the appropriate Territorial Income Tax Ordinance upon the income of any person accruing in, derived from or received in

- (i) East Africa, in the case of a person who is resident in the Territories;

...

in respect of:

- (a) . . .
- (b) gains or profits from any employment or services rendered . . .”

There is no suggestion that the agency agreement was not validly terminated and the only question is whether this gift of money on such termination was taxable under the section set out above. Having considered authorities the learned judge expressed his findings as follows:

“Applying the principles which emerge from these cases I find the following facts:

- (1) Although personal esteem for the appellant may have played some part in the making of the payments there is not sufficient evidence to show that they were inspired by a preponderant personal regard for him. The payments had something to do with his employment as the company’s agent;
- (2) the payments were made by the employer and not by an outside party, in which case the probability is that they are taxable;
- (3) that while it is in the appellant’s favour that the payments were outside the contract and were described in the notice of termination addressed to the appellant personally as being *ex gratia* that notice does refer to his service to the company. Further it is a formal letter and as Mr. Newbold puts it the offer is “sandwiched” between other paragraphs dealing exclusively with the business. The wording was not appropriate to a personal gift, or testimonial, but rather to the offer of a payment in the nature of remuneration for past services in connection with the agency;
- (4) although there is no evidence as to the value of the agency the size of the payment to the appellant personally does suggest that it was more than a personal gift. It is to be contrasted with the silver salver which I believe was the personal gift;
- (5) by crediting the payments to the books of the company the appellant regarded them as being related to the agency;
- (6) the payments were made at the termination of the contract and they were a once and for all payment (see *Seymour’s* case (3)). These are factors in the appellant’s favour but the other factors which I have set out above stand in the way. I am unable to say that the payments were irrespective of the agency and I answer the question posed by Rowlatt, J., by saying that in the end they were not personal gifts but were remuneration, or in the words of the local Acts ‘gains or profits from any employment or services rendered’.”

Counsel for the appellant summarized his grounds of appeal as follows:

- (a) Stress must be laid on the fact that the payments were made after the termination of the legal relationship and therefore the principles applied by the learned judge were not appropriate.
- (b) The learned judge gave undue weight to certain factors which are immaterial.

I will now discuss certain authorities which were dealt with by counsel. In *Herbert v. McQuade* (1), it was held that annual grants to a clergyman from the Queen Victoria Sustentation Fund were assessable to income tax as profits accruing to him by reason of his office. The primary object of the fund was to aid in raising and making up incomes of benefices which were for various reasons deemed inadequate. No enquiry was made by those administering the Fund into the income of the particular holder of the benefice, and they stated that the arrangement was in no sense eleemosynary but in recognition that the

salaries of the benefices assisted were inadequate. It was held that the additional income came to the incumbent only because he was the incumbent of an inadequately provided-for parish and fell directly within the words “accruing by reason of such office”. The Master of the Rolls said (4 Tax Cas., at p. 500) that if that condition was satisfied it did not matter whether the payment in question was voluntary or not.

*Cooper v. Blakiston* (2) is an “Easter offerings” case. It was held that a sum given to a vicar in response to an appeal by the Bishop and Churchwardens was assessable to tax. The Bishop’s appeal contained reference to insufficient parochial endowments and to the clergy being underpaid. In the particular case it should be noted that the appellant had received Easter offerings for the past eight years. The basis of the decision in the House of Lords appears from the following passage in the speech of the Lord Chancellor (5 Tax Cas., at p. 355):

“In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present.

In this case, however, there was a continuity of annual payments apart from any special occasion or purpose, and the ground of the call for subscriptions was one common to all clergymen with insufficient stipends, urged by the Bishop on behalf of all alike.”

Both of these cases, I think, emphasize the non-personal aspect of the gift and its recurrent nature. In neither was there any question of cessation of the office or employment. In the present case the employment had ceased and the gift was not recurrent, both of which elements have a bearing on the question of the nature of the gift.

A case in which termination of employment was given a prominent place is *Cowan v. Seymour* (3), in which the appellant had been secretary and later liquidator of a company without remuneration. His services had been given gratuitously. At a meeting at the termination of the winding-up the shareholders unanimously resolved that the appellant and another be each asked to accept a moiety of the balance of moneys in hand and that they be thanked for the services they had rendered. Rowlatt, J., held that the gift was liable to tax but was reversed by the Court of Appeal. Rowlatt, J., in his judgment reiterated that the voluntary nature of a payment is not material and said (7 Tax Cas., at p. 376):

“If a testimonial is given to the holder of an office, say, like that of a clergyman, when he goes, although it is given to him because he has been a very good clergyman, or other officer, and people admire him, it may be that that would be regarded, or might be regarded as a mere present personal to him, though the occasion of making it arises out of his past services. But in this particular case I think this gentleman, unhappily for him, falls just on the other side of the line.”

In the Court of Appeal the Master of the Rolls said (*ibid.*, at p. 379):

“But to-day I think the argument was rather narrowed to this, that a voluntary payment cannot be a profit of the office after the office has terminated, unless that office had been an office of profit beforehand. Now I cannot accept that as a broad proposition. It seems to me that there may

very well be a payment in respect of an office which had been gratuitous up to its end, but which still might be payment for the services of that office, and therefore be a profit accruing by reason of the office. I do not think that hard and fast line can be drawn.”

And a little later, he said:

“But the fact that the office is at an end is a fact of very, very great weight, and when you add to that that the payment is made, not by the employer, because it was not made and could not be made here by the company, which was the employer, but is made by other persons – in this case, it was by the shareholders individually – the facts still more point to it not being a payment for services, or a profit accruing by reason of the office.”

It will be observed that the Master of the Rolls was dealing with an argument that a voluntary payment cannot be a profit of an office after its termination unless the office had originally been one of profit. In the present case, of course, the employment of the appellant was for profit but that the same reasoning would be applicable appears from the fact that the Master of the Rolls very shortly after the passage last above quoted, referred to the portion of the judgment in *Cooper v. Blakiston* (2) which I have quoted above, in which the office had not been gratuitous. He held that (in the case he was considering) the payment was more in the nature of a testimonial.

In the same case Younger, L.J., said that the holding of the office may have been *conditio sine qua non* but not *conditio causans*. The following passage of his judgment is of interest (*ibid.*, at p. 384):

“But further, to look at the point from another aspect, the payment was made by these beneficiaries after the office had ceased, or at the very least when the duties attaching to it had been in substance all performed; at a moment, therefore, when no further service was contemplated as possible, and at a moment when no right to claim it or any part of it had accrued. Furthermore, it is expressed to be made in the words of gift; the recipient is asked whether he will accept it. In terms it is a testimonial of gratitude for past services, personal in character, as is shown by the fact that there is an equal division of the fund between two gentlemen, whose offices under the company were so diverse in prominence and responsibility as that of chairman and secretary and liquidator, being protected in the case of the chairman, if the expression of gratitude in the resolution is to be looked at, by his services during the winding up, when, of course, as chairman he had no duties to perform, his office having ceased to exist at its commencement.”

I have only one further comment on that case and that is that both the Master of the Rolls and Atkin, L.J., considered that though the fact of the termination of the office was of great weight it was not conclusive. In the judgment under appeal Sheridan, J., distinguished *Cowan v. Seymour* (3) from the present case on the grounds (a) that the payment was not made by the employer, the company, and (b) that gratuitous service had been rendered. Those are practical distinctions but the clergy cases show that the fact that payments are made by third parties is not greatly material and I have already indicated that the reasoning of the Master of the Rolls relating to termination of service does not appear to be limited to cases of gratuitous office.

The next case is *Reed v. Seymour* (4), which went to the House of Lords. A professional cricketer was granted a benefit match; the proceeds, together with public subscriptions, were invested and the income paid to the cricketer; later, a farm was purchased by him with the approval of the trustees of the fund. It was sought to tax only that part of the total amount which arose from the benefit



match (excluding the public subscriptions) and it was held that this was in the nature of a personal gift, and not taxable. In the High Court Rowlatt, J., was influenced to that decision by several factors. They were as follows: (a) The sum, about £2,000 altogether, was very large in comparison with his earnings of £200 or £300 per annum, and appeared more like an endowment or capital sum, an exceptional sum given on an exceptional occasion. (b) He was not to get it at the time but it was invested until his retirement. (c) The subscriptions, which were not sought to be taxed, were in precisely the same position. To those factors it would be well to add one referred to by the Lord Chancellor when the case went to final appeal (11 Tax Cas., at p. 646), i.e., that the terms of his employment did not entitle the cricketer to a benefit. Rowlatt, J., was reversed by the Court of Appeal (Sargant, L.J., dissenting) but his judgment was restored by the House of Lords (Lord Atkinson dissenting). I will quote only from the Lord Chancellor's judgment, at pp. 646–647, when he said:

“If the benefit had taken place after Seymour's retirement, no one would have sought to tax the proceeds as income; and the circumstance that it was given before, but in contemplation of, retirement does not alter its quality. The whole sum – gate money and subscriptions alike – is a testimonial and not a perquisite. In the end, that is to say, when all the facts have been considered, it is not remuneration for services, but a personal gift.”

A different view was taken and *Reed v. Seymour* (4) distinguished by the Court of Appeal (which differed from the view of the Commissioners and the High Court) in *Moorhouse v. Dooland* (5), Mr. Dooland being another professional cricketer. He was taxed in respect of collections taken from spectators on his behalf after various meritorious performances. The following passage from the judgment of the Master of the Rolls (36 Tax Cas., at p. 15) serves to illustrate the basis of the decision and the substantial divergence from the facts of *Reed v. Seymour* (4):

“But there emerge from the facts of the present case three circumstances of the most significant relevance. First, though it is true that Mr. Dooland qualified for the collections by excellencies of performance on his part, they were excellent performances of his professional duty as a cricketer, and they arose in the ordinary course of his service while playing as the cricket professional of the East Lancashire Club. Second, though the performances were exceptional in the sense of being outstanding, they were not exceptional in the sense of being very rare and unlikely to be, save very occasionally at most, repeated. Third, and not the least, it was a term of Mr. Dooland's contract of service that, on each occasion on which he performed his service with the requisite degree of skill, he should be entitled to invite subscriptions for himself from bystanders. It was a right capable of enforcement at law . . .”

There is emphasis upon three matters; that it was not a question of termination, but in the ordinary course of service, that there was present an element of recurrence (mentioned by Lord Phillimore in *Reed v. Seymour* (4) in relation to the cases of ministers of religion) and that the right to the collection was part of the terms of service. None of these factors operates in the case now under appeal.

A case in which the personal qualities of the taxpayer might be thought to have played a prominent part in the acquisition of the money taxed is *Wright v. Boyce* (6). Mr. Wright was a huntsman employed by the Master of a hunt at a wage. It was widespread custom for followers of the hunt in most parts of the country to give presents of cash to the huntsman at Christmas and it was such presents that were held taxable. The main factor in the decision appears to have

been the recurrent nature of the subvention and Jenkins, L.J., said that he was far from saying that a collection organized on the eve of his retirement would be taxable. In distinguishing *Reed v. Seymour* (4) (36 Tax Cas., at pp. 171 – 172) he said:

“It must, I think, be remembered that *Reed v. Seymour* (4) was a case turning very much on its particular facts, and it was, as I see it, a vital element in the case that the benefit match was held and the gate money was collected on the eve of the retirement of Seymour after a long and brilliant career as a county cricketer playing cricket for the county of Kent. It was a ‘once and for all’ payment after very long service and after a long career spent in entertaining the public. It was made at the proper time for making a testimonial, that is to say, on the eve of the retirement of the person to whom it was being given. That was not so in the present case: these payments were made just as much at the first Christmas after Mr. Wright’s assumption of the office or employment of huntsman as at the last.”

This case is, I think, very similar to the Easter offerings case except that in that case there was solicitation of the gifts and machinery for collection was organized. In both cases there was a hope and expectation of such an annual receipt based on custom and arising from the office. Another case in which tips were held taxable is *Calvert v. Wainwright* (7). It related to a taxi driver and was quoted on behalf of the respondent as a case in which the money was received for services from a third party after the service was completed. I think that though the particular service was complete it was merely part of the continuing employment as taxi driver and that there is a general custom of tipping such drivers sufficiently well known to indicate that there would be an expectation of such extra remuneration incident to the employment.

*Denny v. Reed* (8), relied upon for the respondent, is readily distinguishable from the present case in that it involved recurrent payments during employment; Finlay, J. (18 Tax Cas., at p. 258) referred to the importance of the test of whether the sum was paid after the conclusion of the office or while it was going on. *Davis v. Harrison* (9), a case of a second benefit to a footballer, is distinguishable on the ground that it was part of his contractual rights in relation to his employment. *Weston v. Hearn* (10) is, in my opinion, a case rather in favour of the respondent. Gratuities by way of bonus after 25 years’ service were held taxable. The case was not taken to appeal.

Finally, while dealing with the authorities, there is a case which counsel for the appellant considered to be conclusive in his favour. It is *Stedeford v. Beloe* (11), a decision of the House of Lords; so far as I can see it was not relied upon in argument in the court below and was not mentioned by the learned judge. It related to a pension granted to a headmaster of Bradfield College as from the date of his retirement – there was no obligation on the Warden and Council to grant or to continue the pension. There was an unqualified acceptance of the headmaster’s resignation and the pension was granted a month later and was coupled with an immediate payment of £1,000 which, apparently, it was not sought to tax. It was held by the High Court, the Court of Appeal and the House of Lords that the voluntary pension was not assessable to tax.

It is not easy to appreciate the effect of this decision in relation to the present case. It was concerned with Schedule E of the United Kingdom Income Tax Act, 1918 which, by s. 18 (1) of the Finance Act, 1922, had been enlarged so as to include cases formerly coming under portions of Schedule D. It was in relation to the question of taxability under the original Schedule E, that Viscount Dunedin said, in the House of Lords (16 Tax Cas., at p. 520) that the payment was not chargeable, as “It is not given to him in respect of his office as headmaster, because he no longer holds that office of headmaster. It is only given to

him because he is no longer headmaster”. The other noble Lords agreed. The phraseology of that Schedule however is “charged in respect of every public office of employment or profit”. Rule 1 speaks of “every person having or exercising an office or employment of profit . . . in respect of all . . . profits whatsoever therefrom . . .” I am inclined to agree with counsel for the respondent that these words are rather more limiting than those used in East Africa, which are “. . . in respect of gains or profits from any employment or services rendered . . .” In *Stedeford v. Beloe* (11), however, the courts had to consider additionally, whether the payment was taxable under that part of Schedule D referred to in the Finance Act, 1918. That part was carefully examined by Rowlatt, J., in *Beynon v. Thorpe* (12) (14 Tax Cas., at p. 13) a case which he followed in his judgment in *Stedeford v. Beloe* (11). He summarized the position as follows:

“ . . . and the question here is whether this is a profit or gain arising from an employment – ‘profits and earnings of whatever value arising from employments’. It must be a profit or gain within the scope of the Income Tax Acts to be taxable at all.”

That wording is very close to what is in force in East Africa, and in relation to that aspect of the matter the House of Lords brushed any question of taxability aside with the statement that the payments were wholly voluntary. Viscount Dunedin said (16 Tax Cas., at p. 521):

“Now it must be a real profit under Schedule D and it has been held again and again that a mere voluntary gift is not such a profit because it is not, in the true sense of the word, income. It is merely a casual payment which depends upon somebody else’s goodwill.”

That may be thought to cut across other cases in which a gift or a bonus given during employment and related to it has been held taxable. The judgments in the House of Lords are brief and the reference to voluntary gifts must be construed in the light of those cases and in a limited sense. I would quote only one further passage from that case – from the judgment of the Master of the Rolls in the Court of Appeal, with reference to the sum which was paid immediately and not taxed (*ibid.*, at pp. 511–512):

“The fact that he was made a payment of £1,000 immediately indicates that the governors were grateful for his services, sympathetic towards his position, and I do not doubt whether it could be contended that that payment of £1,000 was anything but a gratuity or present in recognition of the regard in which he was held by the governing body.”

While I do not find that case conclusive in favour of the appellant I think it provides strong support for the proposition that in considering whether a payment is truly voluntary and not in the nature of extra remuneration arising out of employment the fact that it was made after the completion of the service and without legal obligation is of high importance. As much was said by the Master of the Rolls in a passage from *Cowan v. Seymour* (3) which I have already quoted.

I have mentioned that in *Stedeford v. Beloe* (11), Rowlatt, J., followed his own decision in *Beynon v. Thorpe* (12). There are some passages in his judgment in that case, which was another case of a voluntary pension, which are of interest. The first reads (14 Tax Cas., at pp. 13–14):

“It is perfectly true that a voluntary payment or a gift, though in itself not a profit or gain at all, may become a profit or gain in the hands of the recipient if it can be attached to an office or if it can be attached to an employment or vocation, of which we have many instances. The best known

instances are of course the offerings made voluntarily to ministers of religion which give rise to many cases, that is they become profits or gains of an office, because although they are voluntary it is by the office which is the source of the minister's taxable income that he has been given them. So also voluntary payments made to persons exercising employments: gratuities to servants and so on, are, undoubtedly, because they are servants – I do not mean to say from masters to servants but to people like waiters, to put a concrete example – gratuities to people of that kind, which they get because they are carrying on a particular employment: although they have no right to ask for them, when they do get them they get them as profits or gains in their employment and therefore they are profits or gains which are taxable. But a mere gift is not a profit or gain at all.”

The learned judge went on to deal with cessation of employment in relation to Schedule E. He continued (*ibid.*, at p. 14):

“But it is said that nevertheless they are in respect of the employment. Well, it seems to me that is complete fallacy. It is nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude or that sort of moral obligation if you please: it is merely a gift of that kind. In this case it happens to be very large; in many cases it is very small, but in all the cases it seems to me, whether it is a large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or another; and as the Lord President in Scotland points out it is only a matter of history that the feeling between the parties which has generated the gift arises out of an employment.”

I think that the last passage, besides being descriptive of what happened in the present case, is illustrative of what was intended when the House of Lords spoke of voluntary gifts in *Stedeford v. Beloe* (11). The earlier passage is a summary of the cases in which the factors of continuing employment and recurrent payments have been prominent.

It may be that the learned judge in the High Court in his finding (2) which I have set out above, was influenced by the following passage from para. 728 of Simon's *Income Tax* (2nd Edn.), Vol. 2, at p. 577:

“It may be said generally that voluntary payments or gifts (except in so far as certain concessions apply, see paras. 730, 731, post) made by an employer or employing body to an employee are assessable to income tax, except so far as it can be shown that there was a preponderant element of the personal in the gift.”

The contention of counsel for the appellant that the reference in that paragraph is to cases of continuing employment is supported by note (o) at p. 582 in the same volume which virtually says as much. That note is in relation to para. 733, which after dealing with legislation with regard to voluntary pensions, states:

“It should be observed that the section only applies to pensions and annual payments, and that a voluntary lump sum payment on retirement is still to be treated as a gift within the reasoning of the cases cited in note (o).”

Note (o) includes reference to *Stedeford v. Beloe* (11). Further reference is made in para. 738 of the text book to payments on termination of employment but relates to cases such as those known as the “golden handshake” cases. I will not embark upon any discussion of them, but would comment that if, as was held in

*Henley v. Murray* (13), a sum paid to a director for the surrender of his rights in respect of his office, is not taxable, it is difficult to see how the payment in the present case more closely approximates gains or profits from employment.

While it may seem from perusal of the varying judgments in such cases as *Reed v. Seymour* (4) that the expression “quot homines tot sententia” is applicable to this branch of taxation law, I find myself, with respect, unable entirely to agree with the reasoning of the learned judge in the High Court as expressed in his findings. As to the first of the latter I would have thought that the measure of esteem in which the appellant was held was the amount of the gift, for there was no obligation to make it. A payment is not taxable merely because it has “something to do” with the employment, if as Rowlatt, J., said in *Cowan v. Seymour* (3) “the occasion of making it arises out of his past services”, or as Younger, L.J., put it, “the holding of the office may have been *conditio sine qua non* but not *conditio causans*”.

The second finding of the learned judge would have greater force in a case of continuing employment. The third finding relates to the wording of the letter which I have set out above. I am afraid I cannot see why the wording is not appropriate to a personal gift. It is a statement of intention, and I see no force in the argument that it is contained in a business letter; in fact I do not think there could be a more appropriate way of ameliorating the effect of a disappointment. The letter states that the gift is personal and a mark of appreciation for long and loyal service. What could be clearer? While the taxability of a gift is not conclusively determined by the way an employer describes it, there can be no doubt about the intent conveyed by the wording of the letter in the present case. Why should it be related to past remuneration? It does not say, “We realize you have been paid on rather a low scale in the past”. I can find in it no more than “a gift moved by the remembrance of past services already efficiently remunerated as services in themselves”. (Rowlatt, J., in *Beynon v. Thorpe* (12).) While on the subject of the letter I should add that I find no significance in the fact that it was written before the actual termination of employment. So far as the gift is concerned it is a mere statement of intention, quite unenforceable, and the gift itself was made after the employment was over. It is the substance of the matter which must be looked at. The phrase “without admitting any legal liability for doing so”, provides some support for the respondent’s argument on this question but cannot outweigh other considerations and in essence only emphasizes the gratuitous nature of the intended gift.

I am unable to agree with the fourth finding. As Rowlatt, J. said in *Beynon v. Thorpe* (12), a gift may be large or small, and there is, as the learned judge said, no evidence by which to compare it in the present case with the value of the agency. As to the fifth finding, there is no evidence as to the ownership of the shares in “the company” and surely the appellant was at liberty to do anything he wished with the money he was given. If I may use a common expression, there were no strings attached to it.

The sixth finding is the most important, and I think with respect that the authorities I have referred to above indicate that the learned judge attached too little weight to the factors that the gift was made after the termination of the employment, that it was not in any way recurrent, and was not made pursuant to legal obligation, or in relation to any custom or to any legitimate expectation on the part of the appellant arising from the nature of the employment. In my opinion too little weight was attached to those factors and too much to the factors I have discussed above in relation to the other findings.

I have kept in mind that this appeal lies only upon a question of law or of mixed fact and law. As I have found that there was error in the proper application of a principle I consider the matter to be one of mixed fact and law.

Each case depends, of course, upon its own circumstances, but Lord Hanworth, M.R., in *Stedeford v. Beloe* (11) (16 Tax Cas., at p. 512) and Jenkins, L.J., in *Moorhouse v. Dooland* (5) (36 Tax Cas., at p. 24) took the same view of the cases before them.

For the reasons I have endeavoured to express, in my opinion, the amount in question in this case was a personal gift made after termination of employment and is not taxable as gains or profits from employment or services rendered. I would allow the appeal with costs in this court and below, certified for two counsel; I would set aside the decree in the court below and substitute an order that the assessments in question be annulled.

**Sir Ronald Sinclair P:** I agree with the reasoning and conclusions of the learned Vice-President and have nothing to add. The appeal is allowed with costs in this court and the court below and a certificate for two counsel is granted. The decree in the court below is set aside and the assessments annulled.

**Crawshaw JA:** I also agree.

*Appeal allowed.*

For the appellant:

*K Bechgaard, QC and AB Patel*

*Singh & Treon, Kampala*

For the respondent:

*GC Thornton and LK Waiyaki* (Ag. Legal Secretary and Asst. Legal Secretary, E.A. Common Services Organization)

*The Legal Secretary, E.A. Common Services Organization*

## **MB Nandala v Father Lyding** [1963] 1 EA 706 (HCU)

|                          |                                 |
|--------------------------|---------------------------------|
| <b>Division:</b>         | High Court of Uganda at Kampala |
| <b>Date of judgment:</b> | 9 December 1963                 |
| <b>Case Number:</b>      | 19/1963                         |
| <b>Before:</b>           | Udo Udoma CJ                    |
| <b>Sourced by:</b>       | LawAfrica                       |

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[1] *Evidence – Affidavit – Interlocutory application – Affidavit in support – Facts stated to be true to best of deponent’s knowledge information and belief – Deponent’s means of knowledge not stated – Facts clearly within personal knowledge of deponent – Whether affidavit contravenes Civil Procedure Rules, O. 17, r. 3 (U.).*

[2] *Business names – Firm not registered – Particulars of business not furnished within prescribed*

*period – Application for relief against disability imposed by Business Names Registration Ordinance (Cap. 213), s. 10 (U.).*

### **Editor's Summary**

The plaintiff applied for relief against disability imposed by s. 10 of the Business Names Registration Ordinance in respect of his contract with the defendant, the subject matter of the action. The application was supported by an affidavit of the plaintiff which ended with the words that the facts stated therein were true to the best of the deponent's knowledge information and belief. At the hearing of the application the defendant submitted that the whole affidavit should be struck off on the ground that it contravened O. 17, r. 3 of the Civil Procedure Rules because it did not disclose the source of the deponent's knowledge information and belief. For the plaintiff, it was contended that the concluding paragraph of the affidavit was unnecessary as the averments in the rest of the affidavit concerned matters within the personal knowledge of the plaintiff, and not matters derived from information by someone else. In his affidavit the plaintiff had stated that he had started his business as a contractor in the name and style of Budadiri First Class Contractors in January, 1963, and immediately thereafter he won two contracts execution of which he continued till June, 1963; that while he was engaged upon these contracts, which he did alone, his brother



was in hospital which further curtailed his available time and that he was later able to furnish the Registrar with the particulars required under s. 5 of the Ordinance and that the business was registered on July 5, 1963.

**Held –**

- (i) the contents of the concluding paragraph of the affidavit were empty verbiage and unnecessary, and that paragraph should be struck off; the contents of the rest of the affidavit were statements of facts within the knowledge of the plaintiff and related to his own personal activities and accordingly O. 17, r. 3 was not contravened;
- (ii) the court was satisfied that it was just and equitable to grant the relief claimed by the plaintiff under s. 10 of the Business Names Ordinance.

Application allowed.

**Cases referred to in judgment:**

- (1) *Phakey v. Worldwide Agencies, Ltd.* (1948), 15 E.A.C.A. 1.
- (2) *Standard Goods Corporation, Ltd. v. Harakhchand Nathu & Co.* (1950), 17 E.A.C.A. 99.
- (3) *Federal India Assurance Co., Ltd. v. Anandrao Dixit*, [1944] A.I.R. Nag. 161.

**Judgment**

**Udo Udoma CJ:** This is an application by the plaintiff in this case for relief against disability imposed by s. 10 of the Business Names Registration Ordinance (Cap. 213), in respect of his contract with the defendant, the subject-matter of this action.

The application is supported by an affidavit sworn to by the plaintiff (hereinafter to be referred to as plaintiff-applicant) and dated October 11, 1963. There is also a counter-affidavit by the defendant (hereinafter to be referred to as defendant-respondent) dated October 31, 1963. Paragraph 6, which is the concluding paragraph of the plaintiff-applicant's affidavit, is in the following terms:

“6. That what I have stated herein is true to the best of my knowledge information and belief.”

At the hearing of the application counsel for the defendant-respondent raised a preliminary objection. He applied that the whole of the plaintiff-applicant's affidavit be struck off on the ground that it is bad in law in that para. 6 of the said affidavit contravenes O. 17, r. 3 of the Civil Procedure Rules. His contention is that the statement in general terms in para. 6 of the said affidavit, namely, “That what I have stated herein is true to the best of my knowledge, information and belief”, contravenes O. 17, r. 3 of the Civil Procedure Rules in that the declaration therein does not disclose the source of the deponent's information and belief.

For the plaintiff-applicant, it was contended that para. 6 of the affidavit was unnecessary as the averments in the rest of the affidavit other than para. 6 thereof concerned matters within the personal knowledge of the plaintiff applicant as deponent thereto, and not matters derived from information by someone else, and that therefore the material contents of the affidavit as such do not contravene O. 17, r. 3 of the Civil Procedure Rules.



For the proper appreciation of the objection which has been raised it is necessary, I think, that the affidavit complained of be set out hereunder in extenso. The affidavit consists of six paragraphs and is as follows:

“1. That I am the plaintiff to the above suit, and that at all material

- times have been carrying on the business of a contractor in the name of Budadiri First Class Contractors.
2. That I began the above business in the month of January, 1963, and that immediately on commencement I was given consecutively two contracts of murram laying on Bumagabula Road and on the Buyaga-Bulagamy Road by Bugisu District Administration and that the execution of these contracts continued up to June, 1963.
  3. That during all this period I was alone in the firm executing the contracts and consequently found it impossible to give my attention to all other work connected with the business; and that during the four months of this period my brother was seriously sick in hospital at Mbale and since I was the only person in the family to offer assistance this further curtailed my full attention to other matters of the business.
  4. For these reasons I could not have the time to find out the legal requirements regarding such business, and hence I was in default in furnishing statements of particulars as required by the Business Names Registration Ordinance (hereinafter referred to as the Ordinance).
  5. That as soon as it was humanly possible I immediately sought advice from my advocates and as a result a statement of particulars was duly furnished to the Registrar and the business name was duly registered on July 5, 1963, certificate No. 12597 being issued.
  6. That what I have stated herein is true to the best of my knowledge, information and belief.”

The averments contained in paras. 1 to 5 of the affidavit as set out above would appear to relate to matters in the physical observation of the deponent. They relate to matters peculiarly within his knowledge, and indeed to what may be described as his own personal activities.

The provisions of O. 17, r. 3 of the Civil Procedure Rules said to have been contravened by the above affidavit are as follows:

- “3.(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated.
- (2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.”

In support of his submission that the affidavit is bad in law and should be struck off because it contravenes O. 17, r. 3 of the Civil Procedure Rules, counsel for the defendant-respondent has cited and relied on *Phakey v. Worldwide Agencies, Ltd.*(1); *Standard Goods Corporation, Ltd. v. Harakhchand Nathu & Co.* (2); and *Federal India Assurance Co., Ltd. v. Anandrao Dixit* (3).

I propose to consider these authorities in the light of the provisions of O. 17, r. 3 of the Civil Procedure Rules.

*Phakey v. Worldwide Agencies, Ltd.* (1) was a case tried by the Supreme Court of Kenya. In what may be regarded as an obiter dictum Sir G. Graham Paul, then Chief Justice of Tanganyika, in his judgment in the Court of Appeal in Eastern Africa, in which, incidentally, he dismissed the appeal in that case, had referred in very caustic terms to a certain affidavit filed in support of a motion to

disallow an amendment which was made to cure a defect in the proceedings as to the name by which the plaintiff in that case had sued. In particular, he pointed out that para. 4 of that affidavit was based on information and belief but that the grounds of the belief had not been stated and that that was a gross breach of the rule as to affidavits. He therefore warned that such practice should cease.

In *Standard Goods Corporation, Ltd. v. Harakhchand Nathu & Co.* (2) which was another Kenya case, an affidavit in support of a chambers summons had alleged that “the defendant company has been disposing of its goods and giving away some of them to person or persons who are alleged to be its creditors.” Paragraph 2 of the affidavit stated: – “The facts stated herein are within my knowledge.”

Paragraph 7 stated: – “What is stated above is true and correct to the best of my knowledge and information.” It was held that where an affidavit is made on information it should not be acted upon by any court unless the sources of such information are specified, and that reading paras. 2 and 7 of the affidavit together, it was clear that the deponent was stating facts without stating which were from his own observation and which from information.

These two judgments are most authoritative and are of course binding on this court. The principles enunciated by them are now well settled. It is a well recognised rule of practice that a statement in an affidavit alleged to have been derived from a third party is hearsay and ought to disclose its source. But I think that these two cases are distinguishable from the circumstances of the instant application. For instance, it is patently clear that the statement that “the defendant company has been disposing of its goods and giving away some of them to person or persons who are alleged to be its creditors”, contained in the affidavit dealt with in *Standard Goods Corporation, Ltd. v. Harakhchand Nathu & Co.* (2) was based on hearsay, and that its source ought to have been disclosed. It is right, I think, to observe that both these decisions were not based on the construction of any particular Rules of Court.

Then in *Federal India Assurance Co., Ltd. v. Anandrao Dixit* (3), in which the verification paragraph of an affidavit of a defendant was: “I, the defendant Anand Rao son of Pandurang declare on affirmation that the entire contents of paras. 1–3 above are true according to my knowledge and according to information received and believed to be true,” it was held that the paragraph made the whole affidavit meaningless and infructuous because it was difficult to see how the identical facts could be verified both on knowledge and information. Besides, it was further held that r. 4 of the Indian Civil Procedure Code enacted that statements upon belief are not admissible in an affidavit except on an interlocutory application, and that in the circumstances of that case, the defendant’s affidavit was not evidence upon which it was competent for the court to act.

It is to be noted that *Federal India Assurance Co., Ltd. v. Anandrao Dixit* (3) was not an interlocutory application, whereas the present application under consideration is. It was an application for a revision of an order, which had set aside a decree obtained *ex parte*. Moreover, the decision in that case turned on the point that there was no evidence before the court as there was no order by the court for affidavit evidence in terms of the relevant order of the Indian Civil Procedure Code. The court held further that as the order setting aside the decree was not interlocutory but was of a substantive nature, the affidavit evidence was not admissible without an express order of the court made in that behalf.

Howbeit, the whole of the affidavit, which was before the court in that case is not before me nor is this court bound by the Civil Procedure Code of India. It seems to me therefore that the decision of the court in the instant application must of necessity turn on the construction of O. 17, r. 3 of the Civil Procedure Rules, which is said to have been contravened by the affidavit of the plaintiff-applicant.

Order 17, r. 3 of the Civil Procedure Rules expressly excludes hearsay evidence in affidavits except where such affidavits are in support of interlocutory applications; and even then it is only statements based on the deponent's belief which are admissible in the discretion of the court provided that the grounds of such belief are disclosed in the affidavit. There is no specific mention in the provisions of the rule of a statement based on information upon which great emphasis is laid in the decisions of the two Eastern African cases cited above, presumably because belief must be based on some information.

On a careful examination of each of the paragraphs of the affidavit of the plaintiff-applicant herein it seems clear that every averment contained in paras. 1 to 5 of the said affidavit concerns the activities of the deponent himself. There is nothing relating to information or belief. I am of the opinion that para. 6 of the affidavit is completely unnecessary and meaningless in terms of the contents of the other paragraphs of the affidavit.

I am satisfied that the contents of para. 6 of the affidavit are a mere empty verbiage – a surplusage – which bear no relation to the contents of the affidavit as a whole. It is therefore severable from the rest of the affidavit without in any way affecting the merits or detracting from the remaining paragraphs of the affidavit, as in my view, the contents of paras. 1 to 5 of the affidavit are statements of facts peculiarly within the knowledge of the deponent and relate to his own personal activities.

In the circumstances, I would strike off para. 6 of the affidavit, leaving thereby the rest of the affidavit as I am satisfied that the contents thereof are facts which the deponent is able of his own knowledge to prove. Accordingly para. 6 of the affidavit is hereby struck off.

I turn now to consider the main application for relief under s. 10 of the Business Names Registration Ordinance, 1951, the relevant provisions of which are as follows:

- “10. (1) Where any firm or person by this Ordinance required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceedings whether in the business name or otherwise;

Provided always as follows:

- (a) the defaulter may apply to the court for relief against a disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter, unless the court otherwise orders, and on such other conditions (if any) as the court may impose, but such relief shall not be granted except on such service and such publication of notice of the application as the court may order, nor shall relief be given in respect of any contract if any party to the contract prove to the satisfaction of the court that if this Ordinance had been complied with; he would not have entered into the contract.”

In his affidavit in support of this application the plaintiff-applicant has sworn that he started his business as a contractor in the name and style of Budadiri First Class Contractors in January, 1963. Immediately thereafter he won two contracts of murram laying from the Bugisu District Administration, which he

successfully carried out up to June, 1963. While he was engaged in the execution of the said contracts, which he did alone, his brother was admitted sick in hospital at Mbale and that necessitated his assistance as he was then the only one in the family. He was only later able to furnish to the Registrar the particulars required under s. 5 of the Business Names Registration Ordinance and his business was registered on July 5, 1963.

The contract, the subject-matter of this action, was concluded between the plaintiff-applicant and the defendant-respondent in March, 1963, and the bill for the work on completion was submitted to the defendant-respondent on May 13, 1963. That was followed by a demand notice on May 17, 1963 (see counter affidavit of defendant-respondent). The plaint in the action was filed on May 28, 1963. This was followed by the defendant-respondent's written statement of defence dated June 11, 1963, in which it was pleaded that the plaintiff-applicant's business not having been registered, the plaintiff-applicant was disabled from enforcing his rights (if any) under or arising out of the alleged contract (see statement of defence filed, para. 2).

In his counter-affidavit in opposition to this application the defendant-respondent does not therein aver that if the provisions of the Business Names Registration Ordinance had been complied with by the plaintiff-applicant he would not have entered into any contract with him.

Under s. 7 of the Business Names Registration Ordinance the plaintiff-respondent should have furnished particulars required by s. 5 of the Business Names Registration Ordinance within fourteen days after he had commenced his business. That he failed to do and therefore became a defaulter.

I think, however, that this is a proper case in which to grant relief, as I am satisfied that the defendant-respondent will in no way be prejudiced. The business is now properly registered with the Registrar of Business Names. I do not think it equitable for the defendant-respondent to have opposed this application as the issue in controversy between the parties as to the contract ought to be determined on its merits. On a careful consideration of all the circumstances of this application, I am satisfied that it is just and equitable that the plaintiff-applicant be granted relief in respect to the contract, the subject-matter of this action, and I do so now accordingly grant relief to the plaintiff-applicant under the provisions of the proviso to s. 10 of the Business Names Ordinance, 1951, on terms that the defendant-respondent shall be entitled to the costs of this application. Order accordingly.

*Application allowed.*

For the plaintiff:

*JS Patel*

*JS Patel, Kampala*

For the respondent:

*JM Shah*

*Patel & Shah, Kampal*